LIBRARY
SUPREME COURT, U. S.

FILED
SEP 7 1968
JOHN F. DAVIS, CLERK

NO. 487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN T. CHADWELL
RICHARD W. McLAREN
PAUL H. LaRUE
135 South LaSalle Street
Chicago, Illinois 60603

Of Counsel:

CHADWELL, KECK, KAYSER,
RUGGLES & McLAREN
135 South LaSalle St.
Chicago, Ill. 60603

WILLIAM E. NUESSLE
JOHN M. RICHMAN
260 Madison Avenue
New York, New York 10016

Attorneys for Petitioner

September 6, 1968

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	7
1. The Interpretation of the Cost Justification Proviso Adopted in the Decisions Below Is an Artificial One Which, If Permitted to Stand, Will Deter Vigorous Price Competition	8
2. The Effect Upon Competition Standard Used Below to Test the Validity of Sealtest's Costing Procedures Destroys the Absolute Nature of the Cost Defense	10
3. The Decisions Below Misinterpret And Misapply This Court's Decision in United States v. Borden Co., 370 U.S. 460 (1962)	13
4. The Decisions Below Are in Conflict With the Decision of the Court of Appeals for the Sixth Circuit in American Motors Corp. v. FTC, 384 F.2d 247 (1967), Cert. Denied, 390 U.S. 1012 (1968), and Well Established Precedents	15
5. The Court of Appeals' Enforcement Order in This Case Is in Conflict With This Court's Decision in FTC v. Jantzen, Inc., 386 U.S. 228 (1967)	18
Conclusion	22

PAGE

Appendix

Opinion of Court of Appeals for the Seventh Circuit dated May 14, 1968 ..... A-1

Order of the Court of Appeals for the Seventh Circuit Denying Petition for Rehearing dated June 20, 1968 ..... A-21

Final Order Enforcing Order to Cease And Desist, Court of Appeals for the Seventh Circuit, dated July 9, 1968 ..... A-22

Final Order of the Federal Trade Commission dated July 28, 1966 ..... A-23

Opinion of the Federal Trade Commission dated July 28, 1966 ..... A-25

Dissenting Opinion of Commissioner Elman A-69

Concurring Opinion of Commissioner Reilly A-77

Complaint of Federal Trade Commission dated December 31, 1957 ..... A-80

Answer of National Dairy Products Corporation to Complaint A-91

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. 21 (1958 ed.) A-101

Finality Act of 1959 ..... A-105

CITATIONS

Cases

American Can Co. v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951) 12, 17

American Motors Corp. v. *FTC*, 384 F.2d 247 (1967), *cert. denied*, 390 U.S. 1012 (April 8, 1968) 15, 16, 17

Bird & Son, Inc., 25 F.T.C. 548 (1937) 17

Champion Spark Plug Co., 50 F.T.C. 30 (1953) 17

PAGE

FTC v. *Jantzen, Inc.*, 386 U.S. 228 (1967) 2, 8, 18, 19, 20

FTC v. *Ruberoid Co.*, 343 U.S. 470 (1952) 20, 21

National Dairy Products Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,656 (FTC 1966) 1

National Dairy Products Corp. v. *FTC*, 395 F.2d 517 (7th Cir. May 14, 1968) .....*passim*

Russellville Canning Co. v. *American Can Co.*, 87 F.Supp. 484 (W.D.Ark. 1949) 17

Socony-Vacuum Oil Co. v. *United States*, 310 U.S. 150 (1940) 18

Standard Oil Co., 41 F.T.C. 263 (1945) 12, 17

Standard Oil Co. v. *FTC*, 340 U.S. 231 (1951) 12

Thompson Prods., Inc., 55 F.T.C. 1252 (1959) 17

United Biscuit Co. v. *FTC*, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966) 13

United States v. *Borden Co.*, 370 U.S. 460 (1962) 2, 6, 13, 14, 18

United States v. *Borden Co.*, 1966 Trade Cas. ¶ 71,681 (N.D.Ill. 1966) 14

OTHER AUTHORITIES

28 U.S.C. 1254(1) 2

Clayton Act, Section 2(a), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) *passim*

Clayton Act, Section 11, 38 Stat. 734, as amended, 15 U.S.C. 21 (1958 ed.) 3, 18

Clayton Act, Section 11, as amended by the Finality Act, 73 Stat. 243 (1959), 15 U.S.C. § 21 .....3, 7, 8, 9, 19

PAGE

Hearings to Amend the Clayton Act Before the House Committee on the Judiciary, 74th Cong., 1st Sess. (1935-36) 9

H. R. REP. No. 2287, 74th Cong., 2d Sess. (1936) 9

ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962) 13

TAGGART, COST JUSTIFICATION (1959) 17

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

National Dairy Products Corporation ("National") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 14, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the appendix hereto (App. A-1—A-20),[1] is reported at 395 F.2d 517. The opinion of the Federal Trade Commission ("the Commission"), set forth at App. A-25—A-79, is unofficially reported at CCH Trade Reg. Rep. (1965-1967 Transfer Binder) ¶ 17,656 (1966).[2]

---

1. "App." refers to the appendix to this brief. "P.A." refers to the printed appendix below, copies of which are being filed with the Clerk of this Court. "RX" refers to petitioner's exhibits and "CX" to Commission exhibits.

2. The opinion of the hearing examiner appears at P.A. 46-172.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1968. A timely petition for rehearing was denied June 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission and the Court of Appeals misinterpreted and misapplied the cost justification proviso of Section 2(a) of the Clayton Act, as amended, and this Court's decision in *United States* v. *Borden Co.*, 370 U.S. 460 (1962), in holding that a seller's discount to a retail food chain may not be cost justified on the basis of the seller's cost of serving such a chain as a single "purchaser," but instead must be cost justified as if each store unit receiving deliveries were a separate purchaser.

2. Whether the defense of cost justification to a charge of price discrimination in violation of Section 2(a) of the Clayton Act, as amended, is an absolute defense, or whether the Federal Trade Commission can reject an otherwise valid cost justification defense on the ground that acceptance thereof would legitimatize discounts tending to injure second-line competition.

3. Whether the Court of Appeals' application of the Finality Act of 1959 to a proceeding initiated by the Federal Trade Commission prior to the enactment of that Act conflicts with this Court's decision in *FTC* v. *Jantzen, Inc.*, 386 U.S. 228 (1967).

STATUTES INVOLVED

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. Section 13(a), provides in relevant part:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality *** where the effect of such discrimination may be substantially to lessen competion or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

Section 11 of the Clayton Act, 38 Stat. 734, as amended prior to July 23, 1959, 15 U.S.C. 21 (1958 ed.), and The Finality Act of 1959 (Act of July 23, 1959, 73 Stat. 243) are set forth in the appendix (App. A-101—A-110).

STATEMENT

Petitioner, through its Sealtest Foods Division ("Sealtest"), processes and packages fluid milk, cream and related dairy products ("milk"), and manufactures ice cream and other frozen desserts ("ice cream") and distributes the same in various communities east of the Rocky Mountains.

On December 31, 1957, the Commission issued its complaint charging petitioner with alleged price discriminations in sales of milk and other dairy products to operators of retail food stores, in violation of Section 2(a).[3] The initial decision of the hearing examiner upheld the com-

3. The complaint and answer appear at App. A-80—A-100. The alleged violation of Section 2(d) of the Clayton Act, as amended, is not involved in this petition.

plaint charges (P.A. 46-172). National appealed to the Commission primarily on the grounds that its challenged prices and discounts were justified under the cost savings proviso of Section 2(a) and the good faith meeting competition provision of Section 2(b). This appeal was granted in part and denied in part in an opinion by Chairman Dixon (App. A-25—A-69) and a concurring opinion by Commissioner Reilly (App. A-77—A-79). Violations were found with respect to Sealtest's sales of milk to certain customers in the areas of Toledo, Ohio, and New Orleans, Louisiana, and with respect to Sealtest's sales of ice cream to certain customers in the Memphis, Tennessee area. A final order was issued July 28, 1966, Commissioner Elman dissenting and Commissioners MacIntyre and Jones not participating (App. A-23—A-25).

Reversing the hearing examiner in part, Chairman Dixon's opinion upheld Sealtest's cost justification defense to the extent that cost savings were computed for, and discounts were paid to, individual retailers (App. A-33—A-36, A-57). The defense was rejected to the extent that it was computed on the basis of cost savings which were experienced by Sealtest in serving a chain (corporate, voluntary or cooperative) as a "purchaser," Chairman Dixon stating that chain discounts must be cost justified as if each store unit were a separate purchaser (App. A-39—A-42, A-57). National's contentions that this portion of the Commission's decision is erroneous were rejected by the Court of Appeals (App. A-10—A-15; 395 F.2d at 524-27).

Sealtest's sales arrangements with individual store operators are made with each proprietor; sales arrangements with chains are made with local or regional branches in the case of corporate chains, and with sponsoring wholesalers and cooperative headquarters in the case of volun-

tary and cooperative chains. Deliveries to both individual and chain store customers are made to the stores.

Petitioner's cost justification defense was based upon studies of Sealtest's costs of selling and delivering to food store customers, including time studies of regular and special deliveries, expenses of customer accounting, credits and collections, sales service, and advertising and general sales promotion (see, *e.g.*, RX 41A-B; P.A. 667-74). These studies yielded Sealtest's costs per dollar of sales in serving milk purchasers, and its costs per gallon of sales in serving ice cream purchasers (see, *e.g.*, RX 57A, RX 119A).[4]

The evidence with respect to Sealtest's cost of selling and delivering milk to the eleven-store Saveway chain at Toledo is representative of the issue here presented.[5] In the month of the cost study, Sealtest's cost of serving Saveway was approximately 11 cents per dollar of sales.[6] Sealtest's cost of serving its largest independent store

---

4. Individual store data on regular and special deliveries, and allocation of such costs as credit and collection and sales expense, also permitted computation of the costs of serving individual stores of multi-unit purchasers (see, *e.g.*, RX 41A).

5. In addition to owning stores, this corporation had some cooperative "members"; at the time of the hearings it also had an affiliation with the "Red and White" voluntary group (P.A. 916-17).

6. Saveway purchased 162,135 "points" of rebateable products during the study month (one quart being one "point," a half gallon being two "points," etc.—P.A. 652-53) for $32,689. See RX 57A. Deliveries to individual Saveway stores ranged from a high of 44,735 points per month to a low of 2702 points, and averaged 14,738 points per store (CX 168L—weekly figures multiplied by 4.33).

customers was just under 20 cents per dollar of sales.[7] Accordingly, Sealtest's cost saving in selling and delivering to Saveway as opposed to its largest independent store customers was approximately 9¢ per dollar of sales. Notwithstanding this cost saving of 9¢ per sales dollar, the discount difference between Saveway and the largest independent store customers was but 6¢ per sales dollar.[8]

In rejecting such "per-purchaser" cost justification, Chairman Dixon held that "discounts to multi-unit purchasers must be cost justified on a store-by-store basis" (App. A-39—A-40); he found no fault with Sealtest's studies from the accounting standpoint but ruled that, "[*f*]*rom the standpoint of competition,* respondent's method of determining cost for a chain is not related to the realities of the market" (App. A-41) (emphasis added). Upholding Chairman Dixon's opinion on this point, the Court of Appeals interpreted this Court's decision in *United States* v. *Borden Co.*, 370 U.S. 460 (1962), as having "disapproved of discounts permitting an independent store to receive a lower discount than a chain store of the same size" (App. A-11; 395 F.2d at 525). And, applying an effect upon competition standard, rather than an objective cost standard, the Appeals Court observed that, even assuming a chain

---

7. There were seven of these customers, who purchased in the range of 3000-4999 points each; their purchases in the study month totaled $5,165 (RX 57A).

8. RX 57A. Similarly, Sealtest's "per purchaser" cost evidence showed justification of its milk discounts to the Big Bear, Joseph's, National Tea, Kroger and Seaway Foodtown corporate chains, and to the Red & White voluntary chain at Toledo (RX 57A), and of its ice cream discounts to the Food Center corporate chain and the Malone & Hyde voluntary chain at Memphis (RX 119A). The milk discounts to the six corporate chains at Toledo were also cost justified on a "per store" basis (see App. A-15; 395 F.2d at 527).

is the "purchaser" within the meaning of that term in the cost proviso, a costing procedure which justifies a "significantly larger discount than . . . [the chain units] could earn individually, has an anticompetitive effect comparable to that of practices long condemned by the Act" (App. A-12; 395 F.2d at 525-26).

Concluding its opinion, the Court of Appeals decreed that the Commission's order "is affirmed and will be enforced" (App. A-20; 395 F.2d at 529), despite the fact that the Finality Act of 1959, authorizing such enforcement orders, was not passed until approximately a year and a half after this proceeding was initiated by the Commission.

REASONS FOR GRANTING THE WRIT

In holding that a seller subject to Section 2(a) of the Clayton Act, as amended, may not cost justify its discount to a food chain on the basis of its over-all cost of serving the chain as a "purchaser," but must show such cost justification on a "store-by-store" basis, the Federal Trade Commission and the Court of Appeals for the Seventh Circuit have decided an important question of federal law which has not been but should be settled by this Court. Those decisions disregard the plain meaning of the cost justification proviso of Section 2(a) of the Clayton Act, as amended, and ignore the principle that cost justification is an absolute defense to a charge of price discrimination. They are inconsistent with applicable decisions of this Court and with a recent decision of the Court of Appeals for the Sixth Circuit. They create substantial uncertainties—for those charged with administering the Act and for those, including petitioner, charged with compliance—as to the meaning of the cost justification proviso and as to the relationship of the Clayton Act to the national policy favoring vigorous price competition.

In applying the Finality Act of 1959 to this proceeding, initiated in 1957, the Court of Appeals decided an important federal question in conflict with *FTC* v. *Jantzen, Inc.*, 386 U.S. 228 (1967).

1. The Interpretation of the Cost Justification Proviso Adopted in the Decisions Below Is an Artificial One Which, If Permitted to Stand, Will Deter Vigorous Price Competition

Section 2(a) prohibits discriminations in price between "different purchasers," but exempts differentials making "only due allowance for differences in the cost of . . . [selling or delivering] to such purchasers. . . ." The term "purchaser" has the clear and unambiguous meaning of "one who buys"; it connotes nothing as to where or how the buyer takes delivery.

The record in this case is very clear that the chain purchasing agents who negotiate with dairy and ice cream company sales representatives are the chains' "buyers."[9] The record is equally clear that the dairy and ice cream company truck drivers who make deliveries have no selling functions and the chain store clerks or managers who receipt therefor are in no sense "purchasers."[10] Typically, moreover, it is the chain headquarters, and not the individual store, which is billed by the dairy or ice cream company, and it is the chain headquarters, rather than the individual chain store, to which the volume discount goes,

---

9. Chain and group purchasers in Toledo-Monroe have had centralized purchasing—rather than individual store buying—since at least 1955 (see, *e.g.*, P.A. 328-30, 810-12, 821-25, 831-35, 872-79); the discounts go to the chain or group headquarters (P.A. 689, 739-40, 743).

10. See P.A. 648-50, 985-89.

either by check or as a credit.[11]

Nothing in the language of the Act, nor in its legislative history, suggests that the chains in this case were not the "purchasers" from Sealtest, or that Sealtest's cost of doing business with the chains is not the "cost" from which savings may be figured, for purposes of the Act's cost proviso. On the contrary, the Act's legislative history reveals that Congress was fully aware of the centralized purchasing practices of chains, and group buying practices of cooperatives, and it did not intend to disturb the economies realized thereby.[12] Indeed, in strengthening the Clayton Act in 1936, it is abundantly clear that Congress merely intended to outlaw those concessions exacted by chains which had no relation to cost savings.[13] Nevertheless, Chairman Dixon rejected Sealest's cost justification proof based on ". . . its cost per dollar of sales of serving . . . [a] chain as a purchaser" (App. A-37), ruling that "discounts to multi-unit purchasers must be cost justified on a store-

---

11. See P.A. 743. Thus, the Court of Appeals and Chairman Dixon are entirely unrealistic in suggesting that "when a [chain] store, by virtue of being averaged with a larger store, *receives* a discount it has not earned, it gains an unfair competitive advantage . . ." (see App. A-12; 395 F.2d at 525 (emphasis added)).

12. See H.R. REP. No. 2287, 74th Cong., 2d Sess. 17 (1936): "Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail-order house, department store, or by the cooperative grouping of producers, wholesalers, retailers, or distributors . . .—none of them are in the remotest degree disturbed by this bill."

13. *Id.* at 3-4, 8-10. Asked if the bill did not "leave a wide loophole for possible evasion since the selling overhead is greater to independents than to chains," one of its drafters responded: "The size of this loophole is greatly exaggerated; and so far as it exists . . . it is not desired to close it. . . ." *Hearings to Amend the Clayton Act Before the House Committee on the Judiciary*, 74th Cong., 1st Sess. 33-35 (1935-36).

by-store basis" (App. A-39—A-40). The Court of Appeals concurred (App. A-12—A-13; 395 F.2d at 525-26).

So far as we can determine, the decisions below have no precedent; they disregard the business reality (as well as the record in this case) that chains are in fact "purchasers," and that a seller's cost of serving a chain is for all practical purposes its over-all cost of selling and delivering to the chain *as a business unit*.

If the decisions below are permitted to stand, the artificial cost standards which they establish for food chain suppliers will compel artificial pricing and will tend to prevent such suppliers from passing on full cost savings to chain customers, in direct conflict with the basic national policy to foster and promote vigorous price competition and afford the lowest prices to the consuming public.

2. The Effect Upon Competition Standard Used Below to Test the Validity of Sealtest's Costing Procedures Destroys the Absolute Nature of the Cost Defense

Neither the Court of Appeals nor Chairman Dixon even suggested that Sealtest's cost exhibits did not correctly set forth Sealtest's costs of serving its multi-unit customers as "purchasers."[14] Rather, Chairman Dixon held that "this is not a valid costing procedure" owing to the purpose of the statute "to curb excessive concessions secured by chain buyers in competition with independent stores" (App. A-

14. Experts in the accounting field testified that the methods used in developing Sealtest's distribution costs were in accordance with sound and accepted accounting principles, and that the results thereof correctly and realistically set forth Sealtest's costs of serving multi-unit customers. See P.A. 202, 642-44, 982-83, 1179-81, 1192-93, 734-40, 1048-49, 1053-55, 1060, 1070-71, 1089, 1093-95, 1099-1101. There was no contrary evidence.

40). And the Court of Appeals accepted this subjective effect-upon-competition method for testing cost justification, stating (App. A-12; 395 F.2d at 525-26):

> "The Commission observed that when a [chain] store, by virtue of being averaged with a larger [chain] store, receives a discount it has not earned, it gains an unfair competitive advantage of the sort which the amended Clayton Act was designed to prevent. An averaging system, when it permits some stores to receive a significantly larger discount than they could earn individually, has an anticompetitive effect comparable to that of practices long condemned by the Act."

In substance, what Chairman Dixon and the Appeals Court did was to conclude that, since the chain store units competed with independent stores in *selling*, they should be treated as if they were—which they were not—"purchasers" within the meaning of the Robinson-Patman Act, rather than mere delivery points of a purchaser. And they rejected Sealtest's cost proof, not because it was unsound under any objective standard, but because, under their erroneous view that chain store units "receive" discounts, its acceptance would result in competitive injury to some independent stores competing with some chain units.

In thus testing Sealtest's cost proof on the basis of its probable effect upon competition rather than its validity under accepted principles of accounting, the decisions below disregard the principle that cost justification (like good faith meeting of competition) is an absolute defense to a charge of price discrimination—regardless of its impact upon competition. That Congress intended the cost justification defense to be an absolute one in a litigated case, regardless of any effect upon competition, is made clear by the very language of Section 2(a)'s "quantity limits"

proviso.[15] This proviso specifies that cost justified discounts which in fact injure competition may be limited, but only by commodities, and only upon a carefully circumscribed basis: the Commission must hold hearings and make findings that purchasers in very large quantities are so few that the discounts granted on account thereof are unjustly discriminatory or promotive of monopoly. Clearly, such a limitation would be permissible only on the basis of an industry-wide study. It certainly is not properly imposed—as here—through the medium of a strained and unrealistic interpretation of the terms "purchaser" and "cost" in a litigated proceeding involving a single seller.

The Commission recognized the absolute nature of the cost defense in the *Standard Oil (Detroit)* case, 41 F.T.C. 263, 282-83 (1945),[16] and the rule does not even appear to have been questioned since the decision in that case. Under

---

15. Under that proviso, ". . . the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those fixed and established. . . ." (15 U.S.C. § 13(a))

16. At the same time, the Commission ruled that the meeting competition defense provided by § 2(b) is not an absolute defense. Reversing, this Court could "find no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them. . . ." Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951). See also American Can Co. v. Russellville Canning Co., 191 F.2d 38, 56 (8th Cir. 1951) (cost justified discount involves "no actionable wrong").

this rule, the Federal Trade Commission cannot, in a litigated case, *directly* refuse to credit acceptable proof of cost justification on the ground that the discounts in question may injure competition. No more can it do this *indirectly* —as it has attempted to do here—by starting with the evidence and saying that since the discounts in question may injure competition, the "costing procedures" are invalid, and, hence, the defense must be rejected.

Particularly in view of the Commission's holdings that, in narrow margin industries, injury to second-line competition will be inferred from small differentials,[17] the position on this question taken by the decisions below, if permitted to prevail, would constitute new legislation and completely negate the cost justification defense.

3. The Decisions Below Misinterpret And Misapply This Court's Decision in United States v. Borden Co., 370 U.S. 460 (1962)

Apparently misapprehending the question before this Court in the *Borden* case, the Appeals Court stated that, in *Borden*, this Court "disapproved of discounts permitting an independent store to receive a lower discount than a chain store of the same size" (App. A-11; 395 F.2d at 525).

In fact, no such question was before the Court in *Borden*.[18] The only issue was "how accurate [the] showing

---

17. See, *e.g.*, United Biscuit Co. v. FTC, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 180-86 (1962).

18. In its *Borden* brief, the government noted the argument, which had been made in the lower court, that "where an independent store is in competition with a particular store of a chain taking a volume of purchases less than the average for that chain's stores, the independent is entitled to secure a discount proportional to the costs of serving it. . . ."; but it conceded, "for purposes

[of cost differences] must be in relation to each particular purchaser," where *different purchasers* were grouped together and the average costs of serving the groups were used for cost justification purposes (370 U.S. at 468). The Court rejected the Borden cost study not because it treated a chain as a purchaser but because in the study Borden improperly (1) lumped large independent stores with small ones, thereby averaging the cost of serving the large independents *up*, and (2) combined a large chain with a small one, thereby averaging the cost of serving the smaller chain *down* (370 U.S. at 468-69).

In remanding the *Borden* case for further proceedings, this Court clearly contemplated that the over-all cost of serving *each chain as a purchaser* should be considered (see 370 U.S. at 471-72). That this was the majority's meaning is confirmed by the concurring opinion of Mr. Justice Douglas, who would have required instead that the dairies establish cost justification of their chain discounts on a store-by-store basis (370 U.S. at 472). In the final judgment, entered by consent of the parties, the mandate of this Court was carried out; Borden was permitted to treat a chain as a purchaser for cost purposes.[19]

Thus, in holding that each individual unit of a chain must be placed in a volume class with independent stores of corresponding size (see pp. 9-10, *supra*), the decisions below entirely misconstrue this Court's opinion in *Borden*. They misapply the principle of "customer classification," which

---

of . . . argument, that the proper volume figure to be used in comparing a chain with its independent competitors is the average volume purchased by the stores of that particular chain." Brief for the United States, p. 39 n. 10, United States v. Borden Co., 370 U.S. 460 (1962).

19. United States v. Borden Co., 1966 Trade Cas. ¶ 71,681 at p. 82,070 (N.D. Ill. 1966) (by definition, a "store customer" includes a firm "operating one or more grocery stores").

is designed to liberalize the proof of cost justification by allowing the *combining* and averaging of the costs of serving *different purchasers* of relatively equal size;[20] they would convert that principle into one which would require a seller to *fragment* and allocate costs of serving *a single purchaser,* and thereby narrow the scope of the defense which has been established by statute.

It should be noted, also, that the final judgment in *Borden* involved a consent order.[21] Accordingly, the Justice Department's position on how a chain is to be treated for cost purposes must be deemed opposed to that of Chairman Dixon and the Court of Appeals. Paradoxically, unless this Court shall intervene, Borden, a major milk and ice cream competitor of Sealtest, operating under a district court decree, may treat a chain as a purchaser for cost purposes, while Sealtest, operating under a Federal Trade Commission order, may not. And competitors of Borden and Sealtest who are subject to the Robinson-Patman Act must elect whether to follow the principles incorporated in the final decree in *Borden,* or by the Commission and the Seventh Circuit in the instant case, at their peril.

4. The Decisions Below Are in Conflict With the Decision of the Court of Appeals for the Sixth Circuit in American Motors Corp. v. FTC, 384 F.2d 247 (1967), Cert. Denied, 390 U.S. 1012 (1968), and Well Established Precedents

At issue in *American Motors* were certain additional discounts granted to four multi-unit "merchandise distribu-

---

20. There is no issue as to customer classification in the instant case; the Commission accepted Sealtest's cost studies insofar as they dealt with discounts granted individual store customers pursuant to Sealtest's volume discount schedules (see App. A-35—A-36, A-57).

21. See note 19, *supra.*

tors" of appliances which were not granted to "regular dealers." American Motors' cost studies did not separate out the costs of serving each unit of the different merchandise distributors but treated the merchandise distributors (or their regional branches) as individual purchasers.[22] The studies showed that in each case, American Motors' discount differential "was substantially less than the cost savings it experienced in doing business with its merchandising distributors" (384 F.2d at 252).[23] In language almost directly applicable to the facts of the instant case, the Sixth Circuit noted (*ibid.*):

> "This cost savings was represented primarily by the fact that American Motors' . . . employees at all levels . . . were able to devote less time to the merchandising distributors than to the regular dealers."

---

22. American Motors made its studies by zones, *e.g.*, Atlanta, New Orleans, Cleveland, Dallas, Detroit, etc., "and, in each, *separately* analyzed the cost savings experienced in doing business with B. F. Goodrich, Alabama Power Company, Consumers Power Company and Sterchi Brothers, as compared with the cost of doing business with the regular dealers in the particular zone. . . ." (384 F.2d at 256-57 n. 7).

23. Distinguishing American Motors' cost studies from those condemned by this Court in *Borden*, the Sixth Circuit pointed out that American "did not average the volume . . . or . . . cost of selling to the respective merchandising distributors" (384 F.2d at 256); that is, American did not average together Goodrich, Alabama Power, Consumers Power, and Sterchi, as Borden (improperly) averaged together A&P and Jewel. In the instant case, the Seventh Circuit seems to have mistaken this to mean that American Motors treated each unit of the different merchandising distributors as a separate purchaser (App. A-12 n. 5; 395 F.2d at 525 n. 5). It should be noted that the basic challenge to the American Motors' study was not its "per purchaser" costing of the merchandising distributors but its treatment of some 6000 regular dealers as a single class (see 384 F.2d at 253).

For some thirty years, the cost proviso has been interpreted, consistently with *American Motors*, to mean that the savings which cost justify price differentials are those realized in "doing business with" some as opposed to other business units.[24] In *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951) the Appeals Court found nothing wrong with combining costs of serving different plants "where . . . operated by a single entity" (*id.* at 59). In so holding it reversed the lower court which had erroneously concluded that the proviso calls for consideration of "sales costs to . . . individual plants of customers who operate more than one" (87 F.Supp. 484, 495-96 (W.D. Ark. 1949)). Before this reversal, however, the FTC staff, relying on the lower court decision in *Russellville Canning*, attacked the cost study in *Champion Spark Plug Co.*, urging that cost justification must be determined by individual shipping points to individual customer plants; the Commission rejected this thesis without comment.[25] Since that time a cost study showing the cost of serving a "purchaser" having multiple divisions was accepted in pertinent part in *Thompson Prods., Inc.*[26]

---

24. See Bird & Son, Inc., 25 F.T.C. 548 (1937) (cost study of doing business with Montgomery Ward as a multi-unit purchaser upheld).

25. 50 F.T.C. 30, 42-43 (1953); see also TAGGART, COST JUSTIFICATION 136 (1959).

26. 55 F.T.C. 1252, 1264-65 (1959) (Thompson Products sold to General Motors, but served its different divisions). See also Standard Oil Co., 41 F.T.C. 263, 277-78 (1945), where, although respondent's cost study failed for other reasons, no suggestion was made that it should have developed costs for each of the service stations of its chain customer, Ned's.

Plainly, there is now a conflict as between the Courts of Appeals for the Sixth and Seventh Circuits[27] in the treatment which will be accorded "per purchaser" cost studies. If allowed to stand, this conflict can be expected to result in appeals from Federal Trade Commission decisions going to the Sixth Circuit, wherever national sellers or regional sellers doing business in that circuit are involved.[28] Food chain suppliers doing business in the Seventh Circuit but not in the Sixth Circuit will be unable to price on a full cost savings basis; they will merely be able to "meet the competition" of those which do operate in the latter area.[29] On the other hand, treble damage complaints based upon alleged unlawful price discrimination may be expected to be filed in the Seventh Circuit.

Aside from the question of forum shopping, until this conflict is resolved, it may be expected to deter price competition based upon cost savings, thus threatening the "central nervous system of the economy."[30]

5. The Court of Appeals' Enforcement Order in This Case Is in Conflict With This Court's Decision in FTC v. Jantzen, Inc., 386 U.S. 228 (1967)

Prior to amendment by the Finality Act of 1959, Section 11 of the Clayton Act provided only for court affirmance of a Commission order to cease and desist upon an unsuc-

---

27. The final judgment agreed to by the Justice Department in *Borden* is consistent with the Sixth Circuit's holding. See p. 14, *supra*.

28. See Section 11 of the Clayton Act, as amended, 15 U.S.C. § 21.

29. This is the course which the Seventh Circuit opinion suggests Sealtest must follow as to intrastate sellers (see App. A-13—A-14; 395 F.2d at 526).

30. Socony Vacuum Oil Co. v. United States, 310 U.S. 150, 226 n. 59 (1940).

cessful petition for review (App. A-101—A-104). Enforcement could be decreed only upon proof that the order had been violated. The Finality Act amended Section 11 to provide that courts of appeals could decree enforcement of orders to cease and desist affirmed on petitions to review, without proof of later violation or other enforcement procedures. *FTC* v. *Jantzen, Inc.*, 386 U.S. at 230-31.[31]

The instant proceeding was initiated by the Federal Trade Commission on December 31, 1957. The Finality Act became effective on July 23, 1959. Section 2 of the Finality Act provides that its new enforcement procedures

> "shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the [Clayton] Act. . . . Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act."

In *FTC* v. *Jantzen, Inc.*, 386 U.S. 228 (1967), Jantzen contended that this provision made the old enforcement procedures applicable only to proceedings in which an application for enforcement or a petition for review had been filed with a court of appeals prior to the effective date of the Act, and left all other pre-1959 orders unenforceable. This Court held that this was too narrow an interpretation of the words "proceeding initiated" and construed the term to mean "the action brought by the Commission against the alleged violator of the Clayton Act." The Court added (386 U.S. at 233): "It follows that the 'proceeding initiated' meant the filing of the 'proceeding' before the Commission and was not limited to the application for enforcement or petition for review."

---

31. The Act also provided that orders not appealed, or as to which court review might be unsuccessful, become final and that civil penalties may be assessed in the event of later violations.

Since the instant "proceeding [was] initiated" more than a year before the enactment of the Finality Act, it follows that the old enforcement procedures of the Clayton Act are applicable. Under those procedures the Commission is entitled to obtain an enforcement decree from a court of appeals only upon a showing that its order has been violated. *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952). Since the Commission could make no such showing below, it was not entitled to a decree of enforcement.

The question raised here is whether petitioner shall be penalized for having defended itself against the Commission's charges. Had petitioner agreed to submit to a consent order even as late as a year after this proceeding was filed, such order still would have preceded the Finality Act; as such it would have been enforceable under the old procedure (see *Jantzen, supra,* 386 U.S. at 234), and petitioner would not have been in jeopardy of civil penalties and possible contempt proceedings on a finding of violation of the broad and generalized order which has been entered by the Commission. The Court of Appeals' enforcement order in effect penalizes this petitioner for having elected to litigate its rights under the broad charges which were contained in the original complaint in this case—despite the fact that petitioner's cost justification and meeting competition defenses were upheld as to the vast majority of its discounts, and that only a handful of its chain discounts were held illegal.

In *Ruberoid,* this Court stated (343 U.S. at 479-80):

> "There is no reason why one who has complied with the order, but who seeks to have it reviewed and modified or set aside, should be placed in a worse position than one who does not exercise that right. We doubt that Congress intended its requirement for enforce-

ment to depend entirely upon which party goes to court first."

By the same token, in the case at bar, petitioner should not be placed in "a worse position" as to the enforcement procedures applicable to it because it exercised its right to assert its defenses rather than to submit to a consent order.

The construction of the Finality Act urged by petitioner, unlike the construction which had been urged in *Jantzen*, would not void a great number of long-standing orders. It would affect only those relatively few orders entered in proceedings commenced before the enactment of the Finality Act but completed after its enactment, and only to the extent that their enforcement must be carried out in the same manner as in other pre-1959 cases.

In any event, under the plain language of the statute and this Court's interpretation thereof in *Jantzen*, and under basic principles of fairness, the order herein should be held subject to the old enforcement procedure.

CONCLUSION

For the reasons hereinabove set forth, petitioner prays that a writ of certiorari be granted.

JOHN T. CHADWELL

RICHARD W. McLAREN

PAUL H. LaRUE

135 South LaSalle St.
Chicago, Ill. 60603

Of Counsel:
CHADWELL, KECK, KAYSER,
RUGGLES & McLAREN
135 South LaSalle Street
Chicago, Illinois 60603

WILLIAM E. NUESSLE

JOHN M. RICHMAN

260 Madison Avenue
New York, N.Y. 10016

Attorneys for Petitioner

September 6, 1968

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967 — APRIL SESSION, 1968

No. 15896
NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

Petition to Review and Set Aside Order and Decision.

May 14, 1968

Before HASTINGS, *Chief Judge,* MAJOR, *Senior Circuit Judge,* and CUMMINGS, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* This case arises on the petition of National Dairy Products Corporation ("National") to set aside an order of the Federal Trade Commission applicable to its Sealtest Foods Division.

National is a Delaware corporation with its principal office and place of business in New York City. It is engaged in the business of purchasing, manufacturing, processing, distributing and selling dairy and other products throughout the United States. It is the nation's largest dairy product distributor. Its Sealtest Division has general supervision over National's food, milk and ice cream divisions and subsidiaries. The Sealtest divisions sell a diversified line of food products, including milk and ice cream. In 1956, National's net sales were approximately $1,352,878,000, increasing to $1,790,834,000 in 1961.

At the close of 1957, the Federal Trade Commission

issued a complaint charging that National had violated Sections 2(a) and (d) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. §§ 13(a) and 13(d)), in the course of sales of milk and other dairy products through its Sealtest Foods Division. In July 1963, a hearing examiner held that National had violated both statutory provisions and accordingly recommended a cease and desist order after rejecting National's defenses of cost justification and good-faith meeting of competition.

National appealed to the Commission from the Section 2(a) portion of the examiner's order. The Commission granted the appeal in part in a 2-1 decision culminating in the following order:

> "IT IS ORDERED that respondent National Dairy Products Corporation, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of any of the items in the product line of its Sealtest Foods Division, including but not limited to fluid milk, dairy products, ice cream and other food products, in commerce, as 'commerce' is defined in the Clayton Act, do forthwith cease and desist from:
>
> > "1. Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price."[1]

---

[1] A second portion of the order concerned National's violation of Section 2(d). National did not appeal to the Commission from that portion of the order, but in this Court, National objected to the entire order on the ground that it was supported by only two of the Commission's five members. In view of *Federal Trade Commission* v. *Flotill Products*, 389 U.S. 179, this point has been abandoned.

In addition to arguing that the Commission's findings and conclusions are unsupported by substantial evidence, National asserts that the Commission majority misinterpreted the clauses in Sections 2(a) and (b) of the Clayton Act dealing with cost justification, good-faith meeting of competition and competitive effects. Commissioner Elman's dissent, on which National relies, deals only with the standards to be applied to the defense of meeting competition under Section 2(b) of the Act. The Commission's order was based on National's discriminatory pricing in the following areas: (1) Jackson-Lansing-Battle Creek, Michigan; (2) Toledo, Ohio—Monroe, Michigan; (3) Memphis, and (4) New Orleans. As to the first area, the Commission held that the evidence was insufficient to find that National's sales were in interstate commerce, so that only the other three areas are presently involved. In this opinion, each area and the legal issues pertaining thereto will be covered separately.

Toledo-Monroe Area

Here in 1958 National granted 13 customers a fluid milk discount of 12%, 8 customers 10%, and one customer 7%. These 22 discounts were in excess of those received by National's other retail store customers. One hundred fifty-eight of them received no discounts and 112 received discounts ranging from 2% to 6%.

Although rejecting the examiner's finding of primary line injury, the Commission sustained his finding of potential secondary line injury to retail grocers selling Sealtest milk. The competitive effects clause of the statute of course does not require showing that injury has actually occurred, but merely that the effect of the discrimination "may be substantially to lessen competition" (15 U.S.C. § 13(a)). As here, any substantial, sustained differential

between competing resellers is *prima facie* injurious. "Mini-injury" is the test. Rowe, "Section 2(a) of the Robinson-Patman Act New Dimensions in the Competitive Injury Concept," 37 ABA Antitrust Law Journal 14,16 (1968).

Only six independent grocery stores received more than a 6% discount from National, whereas most of its chain and group store customers were receiving a 12% discount. These high discounts enabled them to sell Sealtest milk at a price lower than the price paid to National for such milk by all but six of its independent store customers. The evidence clearly shows that National's discounts resulted "in price differentials between competing purchasers sufficient in amount to influence their resale prices" of milk. Under *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37, 47, this showing is adequate to support the Commission's finding that the effect of National's price discriminations might be substantially to injure competition among retail stores in the Toledo-Monroe area.

In *E. Edelmann & Company* v. *Federal Trade Commission*, 239 F.2d 152, 154 (7th Cir. 1956), certiorari denied, 355 U.S. 941, we held the competitive effects clause of Section 2(a) of the Clayton Act satisfied in the following circumstances:

> "We therefore turn to the record which shows substantial discriminations in price; that the purchasers of petitioner's products sold in a market where competition was keen; that these purchasers operated on small profit margins; that many of the purchasers found it expedient to enter into group buying arrangements for the purpose of aggregating their purchases and thereby obtaining higher discounts than they would otherwise receive as ordinary jobbers in contrast to the warehouse distributor."

Since all these factors were present here, the Commission's finding of probable competitive injury must stand. This is true even if there had been direct testimony by non-favored customers that the price discriminations had not injured their business. *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F.2d 674, 680 (5th Cir. 1965), certiorari denied, 382 U.S. 959. As there pointed out, injury may be inferred even if the favored customer did not undersell his rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers.

As in *United Biscuit Company of America* v. *Federal Trade Commission*, 350 F.2d 615, 621 (7th Cir. 1965), certiorari denied, 383 U.S. 926, the Commission did not apply a *per se* test in finding that the competitive effect of National's pricing practices would be substantial. Instead, it relied on the following factors and testimony of independent store owners (Trade Reg. Rep. (65-67 Transfer Binder) ¶17,656, pp. 22,917-22,918) (1966)):

> "They received either no discount or a discount of 2 or 3 percent on their purchases of Sealtest milk. Their retail prices to the public generally were from 41 cents to 43 cents a half gallon. The generally prevailing retail price of Sealtest milk at the chain stores was 37 cents. At regular intervals, either on weekends or each month, the chains offered Sealtest milk at three half gallons for one dollar.
>
> "The independent store owners named chain stores selling Sealtest milk as their competitors. All of them stated that they had lost business as a result of the chain stores' prices, one of them characterizing the effect of such pricing as 'devastating' on his sales volume. Other owners testified that their customers were not willing to pay the price their stores charged for milk and would drive a substantial distance to

> take advantage of low milk prices. One Toledo grocer, in answer to a question as to whether his store was in competition with other stores selling Sealtest milk stated: 'We can't be in competition with them [at] the price we pay for it. We do try to run a special occasionally at a loss to ourselves to try to be competitive.' A Kroger store, receiving a 12 per cent discount, is located four blocks from his store."

This evidence satisfies the *Morton Salt* and *United Biscuit* tests. Furthermore, unless minuscule, the portion of the market that might be affected by the charging of these discriminatory prices is immaterial. *Whitaker Cable Corp.* v. *Federal Trade Commission,* 239 F.2d 253, 255-256 (7th Cir. 1956), certiorari denied, 353 U.S. 938. Nor is competitive injury negated by the pricing policies of National's competitors. *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746, 751, 753-754; *Whitaker Cable Corp.* v. *Federal Trade Commission, ibid,* at pp. 254-256; *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F.2d 674, 679 (5th Cir. 1965), certiorari denied, 382 U.S. 959. We also cannot accept National's argument that the disfavored independents should have joined voluntary or cooperative groups and thus obtained higher discounts. The Robinson-Patman Act does not force them to sacrifice their independence. One of the reasons for its enactment was to protect the independents from the chains and other large buying groups. *Federal Trade Commission* v. *Anheuser-Busch, Inc.,* 363 U.S. 536, 543-544; Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), pp. 11-23.

Even though National's discounts violated Section 2(a) of the Act, National would have a good defense by showing that its lower price "was made in good faith to meet an equally low price of a competitor" (15 U.S.C. § 13(b)). As to its 22 customers receiving more than the customary

discounts, National asserts that discounts to 19 were granted in good faith to meet offers of competitors. The principal reason given by the Commission for rejecting the good-faith meeting of competition defense was as follows (*op. cit.* p. 22,922):

> "[R]espondent has failed to demonstrate any reason to believe that the wholesale list prices of competitors whose prices it claims to have met were the same as its own. Not only has respondent failed to make this showing, but the evidence clearly and convincingly discloses that the wholesale list prices of certain of these competitors were higher than respondent's."

The Commission apparently considered that National had not made the requisite showing because National did not prove that its competitors' list prices were the same or lower, but that requirement is inconsistent with *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746; *Callaway Mills Co.* v. *Federal Trade Commission*, 362 F.2d 435, 443-444 (5th Cir. 1966), and *Forster Manufacturing Co.* v. *Federal Trade Commission*, 335 F.2d 47, 55-56 (1st Cir. 1964), certiorari denied, 380 U.S. 906. We agree with Commissioner Elman's dissenting view that such a burden of proof is too strict and unreasonable and is not imposed by Section 2(b); but even if there were such a burden, National has met it.

Actually the evidence showed that Page's list price for half gallons was 2 cents below National's; Driggs' half gallon prices were the same; Meadowgold's, Trilby Farm's and Cherry Grove's prices were the same or less; while Wilson Dairy, Independent Dairies and United Dairies had lower Monroe prices than National. The only relevant list price missing from the record is Babcock's, and the majority opinion concluded that Babcock's list was higher than National's. The majority speculated

that Babcock must have had a higher list price than Sealtest because Babcock's discount schedule had lower point requirements. If this were true, Babcock would not be competitive with Page, Driggs, or the lower-priced small dairies. The Commission assumed that Babcock's list prices must be higher than National's because National "could not sell milk in this market at net prices which were consistently one or two cents above its competitors'" (*op. cit.* p. 22,923 (1966)). This theory is contradicted by the facts, for the record shows that various National competitors had the same list prices and better discounts than National. Being a well-known national brand, Sealtest could sell at a higher price than local brands. The record shows that Country Store priced Sealtest 2 cents above Driggs, and Sealtest was selling from 2 to 4 cents above Page in Clark's Market. The record also shows that National had 253 independent store customers in the 0 to 4% discount brackets, accounting for more than 10% of National's sales, even though Page's list price was 2 cents less than Sealtest's. Thus Page, without granting any discount, could undercut National in this group by as much as 2 cents. We conclude that no substantial evidence supports the Commission's finding that Babcock's list prices were higher than National's.

The Commission rejected the good-faith meeting of competition defense with respect to National's discounts to the Associated Grocers and Saveway group purchasers, on the ground that those concerns were already planning to replace Meadowgold as their milk supplier. National's representatives were seasoned dairy men and were familiar with the competitive situation, so that they should have been aware of AG and Saveway dissatisfaction with Meadowgold. It was, we believe, permissible for the

Commission to conclude that National did not in good faith believe it was necessary to compete with Meadowgold's prices in order to recapture AG and Saveway as customers.

National has not endeavored to support its discounts to Joseph's, National Food or Wrigley's corporate chains by the defense of meeting competition. Joseph's and National Food were both large customers, and even Wrigley's purchased $4300 worth of milk per month from National. National's failure to support the meeting competition defense to these three customers and AG and Saveway justified the Commission's view that National's discounts in this area might substantially injure competition.

Another reason advanced by the Commission majority for rejecting the defense of meeting competition was that National was meeting unlawful discounts with respect to the AG and Saveway accounts. However, as held in *Standard Oil Co.* v. *Brown,* 238 F.2d 54, 58 (5th Cir. 1956), Section 2(b) may be satisfied unless the seller is meeting prices "that he knows to be illegal or that are of such a nature as are inherently illegal." That standard was met here, for Meadowgold's prices to AG and Saveway were not plainly illegal. Meadowgold's discounts may have been cost justified[2] or made to meet another competitor's discounts.[3] Moreover, as Commissioner Elman observed, the Commission previously abandoned

---

[2] Averaging the cost of serving chain stores was not condemned by the Supreme Court until 1962. *United States* v. *Borden Co.,* 370 U.S. 460.

[3] Under *Sunshine Biscuits, Inc.* v. *Federal Trade Commission,* 306 F.2d 48 (7th Cir. 1962), Meadowgold could obtain new customers by meeting competitive prices selectively.

any requirement that a seller must show it had reason to believe that it was meeting lawful lower prices. See *Continental Baking Co.* (Trade Reg. Rep. (63-65 Transfer Binder) ¶ 16,720 (1963)); *Ponca Wholesale Mercantile Co.* (Trade Reg. Rep. (63-65 Transfer Binder) ¶ 16,814 (1964)), and *Beatrice Foods Co.* (Trade Reg. Rep. (65-67 Transfer Binder) ¶ 17,311 (1965)).

Since the Commission's opinion does not discuss the meeting competition defense with respect to 17 other Toledo-Monroe customers of National, this opinion need not consider those off-scale discounts.

Next, National relies on the cost savings defense with respect to 8 of its 22 customers receiving discriminatory discounts. The milk deliveries were to the individual stores and not to any central warehouse. Time studies showed that it took National's drivers less time per case to deliver to a large volume store, so that National's per case distribution costs would be less in serving such stores. The cost savings proviso permits differentials making "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the delivery methods or quantities" in which commodities are sold or delivered to purchasers (15 U.S.C. § 13(a)). National endeavored to establish this defense both on a "per [chain or group] purchaser" and on a store-by-store basis.

Under the former method, National totaled the distribution cost to each unit and divided it by the total dollar purchases of rebatable products of all units in the chain or group to obtain the cost per dollar of serving the purchaser. This averaging method would warrant the same discounts to all stores whose volume qualifies for the particular discount in question, assuming the discount brackets are fairly drawn. Therefore, averaging

would be permissible for National with respect to six of its corporate chain customers.[4] However, in the case of the Red & White Stores and the Saveway Stores, the averaging method would not be justified in granting a 12% discount to each member store because various of them individually purchased enough milk only to qualify for a much smaller percentage discount, such as received by most of National's independent store customers. *United States* v. *Borden,* 370 U.S. 460, condemns cost justification that would create such artificial disparities. There the Court disapproved of discounts permitting an independent store to receive a lower discount than a chain store of the same size. The following cost savings guidelines were established in *Borden* (370 U.S. at p. 469):

> "A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of 'musts' in the use of the average cost of customer groupings under the proviso of § 2(a) is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered."

National's "per customer" cost savings defense fails because there is no "close resemblance of the individual members" of these two voluntary groups, so that the cost

---

[4] One Kroger store took only 7,864 points a month and was cost justified up to an 11.47% bracket. Being only 1 of Kroger's 22 stores and almost qualifying for the 12% discount, this store should be permitted within the averaging. One Seaway Foodtown store took only 5,891 monthly points and was cost justified only up to 9.18%. As to such a borderline store, any injurious effect of the discount would seem so remote that this store could also be considered as sufficiently homogenous for averaging.

of serving them may not be computed by using the averaging method.[5] Otherwise, as Justice Clark picturesquely put it, one would be "averaging one horse and one rabbit" (at p. 470), with an entirely different cost of serving each.

National argues that "purchaser" as used in the cost proviso means all the stores in a chain or group taken as a unit. This may be true, but it does not help National. The crucial question is not whether a chain is a purchaser, but whether the discount is "due allowance" for cost differences. The Commission observed that when a store, by virtue of being averaged with a larger store, receives a discount it has not earned, it gains an unfair competitive advantage of the sort which the amended Clayton Act was designed to prevent. An averaging system, when it permits some stores to receive a significantly larger discount than they could earn individually, has an anti-competitive effect comparable to that of practices long condemned by the Act. Thus a territorial price discrimination violates the Act because a seller's high prices in one area subsidize its low prices in another. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119. Likewise, the Supreme Court has condemned a basing point system in which the seller obsorbs freight charges to some customers and adds "phantom" freight charges to others. *Corn Products Co.* v. *Federal Trade Commission*, 324 U.S. 726. In that case, the Court noted that the prices

---

[5] *American Motors Corp.* v. *Federal Trade Commission*, 384 F.2d 247 (6th Cir. 1967), certiorari denied, 36 U.S. Law Week 3390, does not support National's use of the average cost of serving the members of the chain and voluntary groups. As the court there observed, American Motors' cost report "Did not *average* the volume of sales or the lesser cost of selling to the respective merchandising distributors" (384 F.2d at p. 256). It was chiefly on this basis that *American Motors* distinguished *Borden*.

were discriminatory because they were related "to factors other than *actual* costs of production or delivery" (324 U.S. at p. 732; emphasis supplied). The same is true here. In the automotive parts industry, discount sales to buying groups have repeatedly been condemned where the group buying does not create cost savings for the seller. *Mid-South Distributors* v. *Federal Trade Commission,* 287 F.2d 512, 517 (5th Cir. 1961), certiorari denied, 368 U.S. 838; *American Motor Specialties Co.* v. *Federal Trade Commission,* 278 F.2d 225, 228 (2d Cir. 1960), certiorari denied, 364 U.S. 884; *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F.2d 674, 675-6 (2d Cir. 1959), certiorari denied, 361 U.S. 826. Because milk is not centrally warehoused, the usual economies of scale associated with chain and co-op buying are absent here. The cost of selling a given volume of milk to one store is the same whether that store is part of a group or chain or an independent. Therefore, when the group or chain receives a greater discount than the independent, the seller is bowing to the size of the buyer and not making "due allowance" for cost savings. In *Federal Trade Commission* v. *Standard Motor Products, Inc.,* 371 F.2d 613 (2d Cir. 1967), enforcement of a Commission order condemning an annual rebate system was denied in part because the Commission "should have analyzed the competitive injury resulting from Standard's purchaser classification." 371 F.2d at p. 621, n. 12. National here asks the Court to fault the Commission for making just such an analysis!

National also argues that abandonment of the averaging system will put it at a competitive disadvantage vis-a-vis intrastate dairies who will continue to grant averaged discounts to chains. If this happens, the net prices of the competing dairies will either be lower than

National's or they will not. If they are lower, the meeting competition defense may be available to protect National; if they are not lower, National will not really be at a competitive disadvantage.

Finally, National relies on a number of cases dealing with the adequacy of cost studies.[6] These are inapplicable because the Commission, reversing the examiner, approved the methodology and results of National's cost study. It is true that if a time-study man has to ride every milk truck on every delivery, the cost justification defense will become a nullity. The Commission has not imposed such an unreasonable requirement here. In fact, it has treated National's one-week study as a reliable barometer of market conditions. In rejecting the averaging system, the Commission has not impugned any of the data obtained by the study; rather, it has interpreted that data in the light of the purpose of the amended Clayton Act to protect independent merchants and in accord with *United States* v. *Borden*, 370 U.S. 460.

Borden does permit the grouping together of reasonably homogenous units. For example, if a National cost study showed that a store using 3,000 units justified a certain discount on a cost basis, under *Borden* National could award such a discount to all other stores similarly situated without doing a time study for each store.

The Commission found that prior to the adoption of the averaging schedule in 1960, National had a discount system in which the purchases of all the stores in the chain or group were aggregated. Under such a system,

---

[6] *E.g.*, *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951); *Reid* v. *Harper & Bros.*, 235 F.2d 420 (2d Cir. 1956), certiorari denied, 352 U.S. 952; *Federal Trade Commission* v. *Standard Motor Products, Inc.*, 371 F.2d 613 (2d Cir. 1967).

a group of stores, none of which was individually entitled to any discount, could obtain the maximum discount by aggregating their purchases. An aggregating systemr bears less resemblance to the realities of cost savings than does an averaging system. National does not seriously dispute this. Rather, it argues that it did not in fact employ an aggregating system but granted the large discounts to meet competition (except as to Joseph's, National Food and Wrigley). Because the evidence is in conflict on this question, we may not distrub the Commission's finding that the prior discount system to chain and group purchasers was based on impermissible aggregating. National did not attempt to cost justify the aggregating practice.

National asserts that is has cost justified its discounts to 6 corporate chains (Big Bear, Joseph's, National Foods, Kroger, Wrigley's, and Seaway Foodtown (except for one store)) even on the store-by-store basis demanded by the Commission.[7] The Commission's brief does not dispute this and our study of the record supports National's portrayal. Nevertheless, National's remaining unjustified discounts in this area adequately support the Commission's competitive injury conclusions.

Memphis Area

In Memphis, 200 independent stores, representing 50% of National's ice cream customers, received no discount. At the same time, National had the following discount schedule in effect for independent stores:

---

[7] The Commission did hold that National's regular discount schedule of 0% to 6% to independent stores was cost justified on a store-by-store basis.

Gallons	*Discounts/Gallon*
0— 49	0
50— 79	2¢
80—109	3¢
110—139	4¢
140 and over	5¢

Under this schedule most independents received no discount. Chain and group stores were accorded a 7¢ per gallon of schedule discount.

The sale of ice cream in this area was highly competitive, and the independent stores receiving no discount were located near many of the chain and group members receiving 7¢ per gallon discount, thus enabling them to sell ice cream at lower prices than the independents. Numerous chain and group member stores handled smaller ice cream volume than numerous independents and yet received the 7¢ discount solely due to their affiliation. Concomitantly, many independents received no discount while equally small affiliated stores received the 7¢ per gallon discount. We agree with the Commission that these facts show that National's discounts had the probable effect of lessening competition at the secondary level. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50-51; *United Biscuit Company of America* v. *Federal Trade Commission*, 350 F.2d 615, 621 (7th Cir. 1965), certiorari denied, 383 U.S. 926; *Whitaker Cable Corporation* v. *Federal Trade Commission*, 239 F.2d 253, 255 (7th Cir. 1956), certiorari denied, 353 U.S. 938. As with the Toledo-Monroe market, such a conclusion is not foreclosed by the availability of these discounts to National's independent customers deciding to join a voluntary or cooperative group.

As in the Toledo-Monroe area, the Commission con-

cluded that National's discount schedule was cost justified. However, to cost justify the 7¢ per gallon discount to chain and group stores, National used an averaging method even though the chain and group stores varied in size. Under *United States* v. *Borden*, 370 U.S. 460, such a cost justification defense was properly rejected.

National also contends that its 7¢ per gallon discount granted to Malone & Hyde, Inc., a wholesale grocer sponsoring a voluntary chain of stores, was a legitimate functional discount. On the other hand, the Commission found that National sold to the M & H member stores rather than to M & H. The invoices stated that the ice cream was "sold to" the particular stores, not to M & H. In addition to the 7¢ per gallon discount, National granted M & H a 2% allowance for assuming the credit risk of the member stores. As the Commission noted, this allowance is consistent with the member stores themselves being the purchasers, for if M & H were the purchaser, National would have no risk as to the credit of the stores. The Commission permitted this 2% allowance as a payment for services performed by M & H for National. It was not included in the price discrimination that the Commission found National gave to the M & H stores.

The Commission explained its conclusion that the M & H stores were the purchasers from National as follows (*op. cit.* p. 22,925):

> "The circumstances are such that there is very little difference between the manner in which a Malone & Hyde member store is serviced by respondent as compared to a non-member retail customer. In both cases, respondent receives orders directly from the store, delivers the ice cream directly to the store and services the cabinets. Whereas an independent store owner may pay the deliveryman, the Malone & Hyde store is furnished with a copy of the invoice and the original

is sent to Malone & Hyde headquarters. Once a week, respondent bills Malone & Hyde for all stores and receives a check drawn on the Malone & Hyde account."

In our view, M & H is sufficiently unlike the ordinary wholesaler to support the Commission's decision that the member stores were the actual purchasers. However, under *Federal Trade Commission* v. *Fred Meyer, Inc.*, 36 U.S. Law Week 4233, the M & H retail stores could be classified as purchasers from National even if they technically purchase from M & H where, as here, such a classification would further the purposes of the Clayton Act, as amended. Cf. *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 512-523.

New Orleans Area, and Scope of Order

Here National sold a private label milk, "Velva," to H. G. Hill Stores, Inc., a chain (and its successor, Winn-Dixie Stores, Inc.) at a net price of about 10¢ per gallon less than to many of National's store customers receiving no discount. Besides the 20% discount to Hill, National sold milk to 5 other wholesale customers at 5-10% off its wholesale list price. The Commission sustained the defense of meeting competition with respect to all customers receiving discriminatory discounts except the Hill Stores.

To sustain the defense of meeting competition with respect to Hill in 1951, National relied on competitors' bids to public institutions. However, the bids to such institutions were not subject to the Act and involved different delivery costs and therefore would not show what the competitors' bids were to Hill.

To sustain the defense of meeting competition with respect to Hill in 1954, National asserts that Hill's repre-

sentative told National of a low offer from the Franklinton, Louisiana, Co-operative. The Commission disregarded Franklinton offer because National had not verified it[8] and because the cooperative's offer was suspect by virtue of National's own cost study. Also, according to the Commission's interpretation of the testimony of National official Lewis Robinson, National did not learn of the cooperative's offer until after making its bid. The Commission found that National's 1954 price to Hill was based on its own cost study. This conclusion was permissible from the evidence adduced.

National contends that it ceased selling milk to Hill's successor in 1960 and that a 1958 Louisiana statute bans discounts on milk, so that the requisite competitive effects no longer exist under Section 2(a). But such a longtime discriminatory practice, if followed elsewhere by National, could similarly injure competition with customers receiving no equivalent discounts, so that the Commission was entitled to consider this evidence in framing its order. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470; *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F.2d 674, 681-682 (5th Cir. 1965), certiorari denied, 382 U.S. 959. Even though National has stopped granting unjustified discounts to Winn-Dixie in New Orleans, its similar practices in Toledo-Monroe and Memphis, as well as its former practice in New Orleans, justified the nation-wide order entered. In contrast to *Dean Milk Co.* v. *Federal Trade Commission*, ... F.2d .... (7th Cir. 1968), there are no

---

[8] Efforts to vertify were present in *Forster Manufacturing Co.* v. *Federal Trade Commission*, 335 F.2d 47, 54 (1st Cir. 1964), certiorari denied, 380 U.S. 906; *Beatrice Foods Co.*, Trade Reg. Rep. (65-67 Transfer Binder) ¶17,311, at p. 22,470 (1965), and *Continental Baking Co.*, Trade Reg. Rep. 63-65 Transfer Binder) ¶16,720, at p. 21,648 (1963), on which National relies.

considerations present here that impel a limitation of the Commission's order to the specific areas where the price discriminations were proved. National operates in 35 states and it is concededly typical for Sealtest to have volume discount schedules in effect at its various operations. The practices condemned by the Commission occurred in widespread areas over a long period of years. Consequently we cannot say that this order was so broad as to constitute an abuse of discretion. See *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428, 431; *Swift & Company* v. *United States*, ... F.2d .... (7th Cir. 1968), and *Lloyd A. Fry Roofing Co.* v. *Federal Trade Commission*, 371 F.2d 277, 284, 286 (7th Cir. 1966).

We have considered other points raised by the parties but they merit no discussion.

The order is affirmed and will be enforced.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit, Chicago, Illinois 60604

THURSDAY, JUNE 20, 1968

Before

Hon. J. EARL MAJOR, Sr. Circuit Judge

Hon. JOHN S. HASTINGS, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

No. 15896

NATIONAL DAIRY PRODUCTS CORP. Petitioner vs. FEDERAL TRADE COMMISSION Respondent	Petition for review of an order from the Federal Trade Commission.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

[CAPTION OMITTED]

FINAL ORDER ENFORCING ORDER TO CEASE AND DESIST

National Dairy Products Corporation, petitioner herein, having filed in this Court on October 10, 1966, a petition to review and set aside an order to cease and desist issued against it on July 28, 1966, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled, "In the Matter of National Dairy Products Corporation," FTC Docket No. 7018; and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on April 9, 1968, and this Court having rendered its decision and judgment on May 14, 1968, affirming and directing the enforcement of the said order to cease and desist;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order to cease and desist of the Federal Trade Commission be, and it hereby is, enforced, and that petitioner be, and it hereby is, commanded to obey the said order and to comply therewith.

By the Court.

/s/ J. Earl Major

/s/ Walter J. Cummings

United States Circuit Judges

1521 UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:
Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter of NATIONAL DAIRY PRODUCTS CORPORATION	DOCKET NO. 7018

FINAL ORDER

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that respondent's appeal should be granted in part and denied in part, and that the appeal of counsel supporting the complaint should be denied; and

The Commission having modified the initial decision to the extent necessary to conform to the views expressed in its opinion:

IT IS ORDERED that the following order be substituted for the order to cease and desist set forth in the initial decision:

ORDER

IT IS ORDERED that respondent National Dairy Products Corporation, a corporation, and its officers,
1522 employees, agents and representatives, directly or through any corporate or other device in or in connec-

tion with the offering for sale, sale or distribution of any of the items in the product line of its Sealtest Foods Division, including but not limited to fluid milk, dairy products, ice cream and other food products, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price;

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of the products in the Sealtest product line, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

IT IS FURTHER ORDERED that the initial decision of the hearing examiner, as modified, be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that respondent National Dairy Products Corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

By the Commission. Commissioner Elman dissented and

has filed a dissenting opinion. Commissioners MacIntyre and Jones did not participate. Commissioner Reilly concurred and has filed a concurring opinion.

/s/ JOSEPH W. SHEA,
Joseph W. Shea,
Secretary.

ISSUED: July 28, 1966

ATTACHED ARE: (1) Opinion of the Commission by Commissioner Dixon
(2) Dissenting opinion by Commissioner Elman
(3) Concurring Opinion by Commissioner Reilly

[CAPTION OMITTED]

OPINION OF THE COMMISSION

1523 By Dixon, Commissioner:

The complaint in this matter is in two counts. Count I charges respondent with discriminating in price in the sale of dairy products in violation of Section 2(a) of the Clayton Act, as amended. Count II charges discrimination in the granting of promotional allowances in violation of Section 2(d) of that Act. In his initial decision, the hearing examiner found that the charges were sustained by the evidence and ordered respondent to cease and desist from the practices found to be unlawful. Respondent has appealed from the findings and order under Count I of the complaint and counsel supporting the complaint has filed an appeal which places in issue the scope of the examiner's order.

Respondent, National Dairy Products Corporation, manufactures and distributes in interstate commerce a variety of food and other products. In 1958, it operated almost entirely through seven separate divisions: Sealtest Foods,

Kraft Foods, Breakstone Foods, Sugar Creek Creamery, Humko Products, Metro Glass, and Research and Development. The evidence in this case under the Section 2(a) charge deals with the pricing practices of one of
1524 these divisions, Sealtest Foods. More specifically, to sustain this charge, complaint counsel introduced evidence dealing with Sealtest's sales of Dairy products, including fluid milk and ice cream, in (a) the Toledo (Ohio)-Monroe (Michigan) area; (b) the Lansing, Jackson, Battle Creek (Michigan) area; (c) the Memphis (Tennessee) area as to ice cream only; and (d) the New Orleans (Louisiana) area.

The evidence establishes, and it is not seriously disputed, that respondent sold its dairy products to competing customers at different prices in each of these areas. Respondent, however, contends that the examiner erred in finding that its price differences in these areas have the required adverse competitive effects, either among its competitors or among its competing wholesale customers (principally retail grocery stores). Additionally, respondent argues that the examiner was in error in rejecting its affirmative defenses that its lower prices in each of these areas were either cost justified or were granted to meet the equally low prices of competitors.

Respondent also contends that the examiner erred in ruling that its sales of fluid milk products in the Lansing, Jackson, Battle Creek, Michigan, area are sales in interstate commerce as required by the statute. As this issue is not raised as to any other area, we will consider it first in this opinion.

There is no dispute that the milk and milk products sold in this area from respondent's Lansing plant are produced in dairy farms located in Michigan, processed in the Lansing plant, and sold exclusively to customers located in Michigan. The hearing examiner, in holding

that sales by the Lansing plant were interstate sales, relies on certain evidence showing the relationship and the interdependence of respondent's various branches, zones and divisions.

The evidence relied upon by the examiner relates to the general over-all organization of respondent's business. However, it is our view that the theory adopted by the examiner would require detailed information as to respondent's internal operations, which is lacking in this record. The interstate commerce issue was not tried on the theory relied upon by the examiner and we conclude that the evidence is insufficient to support his holding.

1525 We turn, therefore, to a consideration of respondent's pricing practices and its defenses in each of the other areas involved in this proceeding.

Toledo-Monroe Area (Milk)

Sealtest Foods operates a milk processing plant in Toledo, Ohio, and this plant maintains a milk distributing branch in Monroe, Michigan. The plant handles a general line of fluid milk products and the milk which it processes and bottles is sold both to wholesale customers and directly to the consumer at retail home delivery. Respondent has 22 wholesale milk distribution routes in Toledo and 5 in Monroe. Approximately 10 percent of the Toledo plant's volume of fluid milk products is shipped to Monroe where it is redistributed on wholesale and retail routes.

About November 1, 1954, the Toledo plant initiated a monthly quantity discount schedule. This schedule was based upon a "point system" whereby each fluid milk product sold by the plant was assigned a point value. The number of points accumulated during a month determined the percentage of rebate earned by the wholesale purchaser. Points were assigned as follows:

1 quart milk (all kinds)	1 point
1 quart half and half	2 points
1 quart whipping cream	8 points
1 quart coffee cream	4 points
1 quart sour cream	4 points
1 quart buttermilk	1 point
5 pound carton cottage cheese	5 points

Discounts ranging from 3 percent to 10 percent were allowed on all items in the plant's line of products except butter, yogurt, Reddi Whip and orange juice. In March, 1955, 11 percent and 12 percent brackets were added to the discount schedule. A 2 percent bracket was added to the schedule in August, 1956. Thus, in 1958 at the time of the hearing in this matter, respondent's Toledo discount schedule applicable to wholesale sales by the Toledo plant and the Monroe branch was as follows:

1526

Points (per month)	Percent
0 - 699	0
700 - 999	2
1,000 - 1,499	3
1,500 - 1,999	4
2,000 - 2,999	5
3,000 - 4,999	6
5,000 - 6,999	7
7,000 - 9,999	8
10,000 - 14,999	9
15,000 - 24,999	10
25,000 - 39,999	11
40,000 and over	12

Evidence introduced by respondent in September, 1960, discloses that on August 1, 1960, the above schedule was superseded by another schedule also containing discount brackets ranging from 2 percent through 12 percent but with the monthly point requirement to qualify a customer for the 12 percent discount reduced from 40,000 points to 10,000 points, and with corresponding reductions in the

point requirements for the 6 through 11 percent brackets. With certain exceptions, allegedly made for competitive reasons, respondent thereafter sold its fluid milk products in accordance with the 1960 revised schedule.

Respondent's principal wholesale customers in the Toledo-Monroe area are independent stores, multi-unit chains which include corporate, voluntary (wholesaler sponsored and supplied) and cooperative (served by retailer-owned wholesale house) chains, and stores under common ownership.

The record establishes the rate of discount granted to all of respondent's Toledo-Monroe customers for the month of July, 1958. Thus, of the independent stores, one hundred fifty-five received no discount; thirty-one received 2 percent; thirty-eight received 3 percent; twenty-six received 4 percent; ten received 5 percent; and seven received 6 percent. There were an additional nine independent stores, three of which were entitled to 2 percent under the schedule but were paid no discount due to oversight or clerical error, four of which received 10 percent and two of which received 12 percent.

1527 Of the corporate chains, the following received 12 percent discounts: Big Bear, Joseph's, National Food, Kroger, Wrigley's and Seaway Foodtown, Inc. Two corporate chains, A & P and Bellmans, received 10 percent and one, Sears, received 7 percent. All of the voluntary and cooperative chains consisting of Associated Grocers, Red & White, Tri County Super Dollar and Saveway, were granted 12 percent discount. One of the three common ownership organizations received 12 percent and each of the other two received 10 percent.

The threshold question for decision with respect to respondent's pricing practices in the Toledo-Monroe area is whether the examiner erred in finding that the effect of its price differences was to lessen competition with respond-

ent's competitors and among its competing wholesale customers. In this regard, the statute does not require a showing that injury has actually resulted, but simply that the effect of the discriminations "may be substantially to lessen competition * * * or to injure, destroy or prevent competition."

With respect to injury among respondent's competitors, complaint counsel introduced the testimony of the representatives of three small Toledo dairies. All three were engaged principally in the sale of milk at retail home delivery, this method of selling constituting 95 percent of one dairy's business, while another operated fourteen such routes and only one wholesale route. The examiner's finding of primary line injury is based on the testimony of these witnesses that they lost home delivery sales because of the low milk prices of local supermarkets.

While not disputing the loss of home delivery sales by these local dairies, respondent contends that the examiner was wrong in predicating competitive injury on this factor alone. It argues that there is substantial evidence in the record as to other factors which caused the losses of sales by these dairies which the examiner failed to consider.

We agree with respondent. Among other things, the evidence establishes that there has been a downward trend in home delivery sales in the Toledo area due to the introduction of half gallons of milk in paper cartons in 1528 supermarkets and due to the every day low prices of milk at "cash and carry" stores which began operating about three years prior to the hearings in 1958. In addition, one witness testified that general economic conditions in the market have contributed to his loss of sales. Respondent's home delivery business in the Toledo area declined about 29 percent from 1954 to 1959. Moreover, the witness testified that other brands of milk, in addition to

Sealtest, were offered by supermarkets at the low prices. The record fails to disclose the extent of such sales of Sealtest milk as compared to competing brands. Under these circumstances, we conclude that the evidence fails to establish the likelihood of competitive injury among respondent's competitors in the Toledo-Monroe area.

Respondent strongly objects to the examiner's statement that it has admitted that secondary line injury may be inferred from its price discriminations. While we fail to find such an admission in this record, its absence is not the controlling factor on this issue. Substantial evidence fully supports the examiner's finding of potential injury among retail grocers competing in the sale of Sealtest milk.

The aforementioned discounts, ranging from 2 percent to 12 percent, were paid by respondent on the basis of its published wholesale list prices. In the period beginning November 4, 1956, to June, 1958, respondent's wholesale list prices for the Toledo-Monroe area ranged from 42 cents to 38 cents for half gallons of homogenized or regular milk and from 21 cents to 19 cents for quarts. At the time of the hearings in this area, the wholesale list price of the Toledo plant was 40 cents for the half gallon container and 20 cents for the quart.

It is conceded by respondent that no independent grocery store purchasing from the Toledo plant received more than a 6 percent discount, whereas virtually all of its chain store customers were receiving a discount of 12 percent. Several independent grocery store owners testified. They received either no discount or a discount of 2 or 3 percent on their purchases of Sealtest milk. Their retail prices to the public generally were from 41 cents to 43 cents a half gallon. The generally prevailing retail price of Sealtest milk at the chain stores was 37 cents. At regular intervals, either on weekends or each month, the chains offered Seal-

test milk at three half gallons for one dollar.

1529 The independent store owners named chain stores selling Sealtest milk as their competitors. All of them stated that they had lost business as a result of the chain stores' prices, one of them characterizing the effect of such pricing as "devastating" on his sales volume. Other owners testified that their customers were not willing to pay the price their stores charged for milk and would drive a substantial distance to take advantage of low milk prices. One Toledo grocer, in answer to a question as to whether his store was in competition with other stores selling Sealtest milk stated: "We can't be in competition with them the price we pay for it. We do try to run a special occasionally at a loss to ourselves to try to be competitive." A Kroger store, receiving a 12 percent discount, is located four blocks from his store.

There can be no doubt from this record as to the intensely competitive nature of the retail milk business in this area and that profit margins are extremely low. In this setting, respondent has continually discriminated in price in its sale of milk to the extent that chain store customers regularly *sell* Sealtest milk at a price *lower* than the price *paid* respondent for Sealtest milk by *all* of its independent store customers, including those receiving the highest discount (6%) granted to an independent under respondent's schedule. The discounts granted by respondent are clearly substantial and we find no error in the examiner's conclusion that the effect of respondent's price discriminations may be substantially to injure, destroy or prevent competition with persons receiving the benefit of such discriminations. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *United Biscuit Co. of America* v. *Federal Trade Commission*, 350 F.2d 615 (7th Cir. 1965).

Having found that a prima facie case of price discrimination in the Toledo-Monroe area has been established, the next issue presented is whether respondent has justified these discriminations under any of the defenses afforded by the statute.

Subsequent to the issuance of the complaint, respondent conducted an extensive study to establish that its discount schedule is cost justified and that certain discounts, while not on the schedule (off-scale), are likewise justified
1530 by cost savings. The study took place in July, 1958, and was conducted by a management consultant firm with the advice and assistance of industrial engineers, accountants, statisticians and economists. The group, after analyzing respondent's operations, determined that unit costs of processing and manufacturing milk do not vary as between different customers. However, it believed that unit costs of selling and delivering do differ as between large and small volume purchasers, and the study was conducted on this hypothesis.

In substance, respondent proceeded on the basis that the cost of operating its delivery routes in very large part represents payment for the time of its deliverymen. Therefore, the time required by a deliveryman to make deliveries of different quantities of milk is of particular importance since, according to respondent's premise, time saved per unit in serving larger as opposed to smaller customers is money saved.

Respondent tested its hypothesis by time studies of delivery operations in the distribution of milk in the Toledo-Monroe area. Since about 85 percent of all Sealtest milk is delivered in this area in a standard wire case, the study group concluded that the best measure of the output of a route driver was the delivery of cases, and that time-volume relationship should be analyzed on the basis of minutes per case delivered.

The time studies covered all 27 of the regular wholesale milk routes operating out of the Toledo plant and the Monroe branch, each for a six-day period, resulting in 162 time studies. In these studies, representatives of the study group or respondent's employees recorded the drop time, that is, the time required by the drivers to deliver the product, place it in the customer's display case, and return empty containers to the truck.

The study group then analyzes the drop time data and determined that it takes more time for a driver to make a large volume delivery than a small one, but less time per unit. For example, respondent's exhibits show that deliveries of 5 to 5.99 cases took an average of 16.44 minutes, or 3.05 minutes per case; deliveries of 30 to 30.99 cases took an average of 37.16 minutes, but only 1.225 minutes per case. After determining this time-volume relationship, the study group's next step was to identify and segregate all expenses applicable to wholesale milk distribution from its Toledo plant. These expenses were then assigned to customers on the basis of the time studies.

1531

The study group then took all of the time-volume observations recorded during the study and by use of a mathematical formula, obtained an equation for computing the normal, or most probable drop-time requirement for any given size of delivery. Using this computed time equation, the study group developed a time-volume curve which could be used in determining the most probable amount of direct labor time required to make delivery of any given size. Respondent tested this curve by sample time studies of direct labor time in other areas where physical distribution of milk was handled in the same manner as in Toledo.

Respondent developed and presented the results of its

Toledo cost study in two steps which are set forth in its proposed findings to the examiner as follows:

> *Step One.* First Sealtest computed the cost of serving each off-premise store, location by location, for the week studied; it then classified all such customer locations—on the basis of volume delivered during the study week—in brackets corresponding to those of its discount schedule * * * and computed the cost of serving locations in each bracket for the week in which they were studied.
>
> *Step Two.* Sealtest secondly presented evidence with respect to the actual costs of serving, and the discounts it actually paid to, different "purchasers" at Toledo. It collected the costs of serving one-store customers (grouping them by volume bracket), and it collected the costs of serving voluntary and cooperative group and corporate chain customers, showing the cost of serving each such purchaser for all the store locations it operated.

1532 The cost exhibits presented under the first step have been designated as "per location" exhibits and those under the second step as "per customer" exhibits. Respondent states that the per location exhibits were not offered as the ultimate proof of the discounts it allowed. Instead, it avers that these exhibits prove (1) the basic cost/volume relationship; (2) that, as administered on a per store basis, its volume *discount schedules* are cost justified; and (3) that the discounts actually paid to independent store customers in accordance with the schedules are cost justified, each as against the others.

The Commission has carefully considered these per location exhibits and finds that, to the extent that sales are made on a location-by-location basis, respondent has justified its Toledo milk *discount schedule.* These exhibits show that respondent has properly computed delivery time,

properly allocated costs, properly applied expenses of selling to each location, and has assigned each location to its proper bracket on the basis of point purchases. These exhibits further establish that, with the exception of a *de minimis* amount between the 11 percent and 12 percent brackets, the cost saving to respondent in serving each higher volume bracket as against the next smaller bracket is at least 1 percent. We conclude that the examiner's criticism of these exhibits on the grounds that respondent used computed time rather than observed time, and that it used a point basis rather than a dollar basis in establishing its volume brackets, is not justified.

We turn next to a consideration of respondent's second, independent line of cost exhibits. Respondent designates these per customer exhibits as its ultimate exhibits, taken directly from the cost data, and offered to show cost justification of the discounts it actually allowed to different *purchasers* in the Toledo-Monroe area.

As we have previously stated, all of respondent's independent store customers for whom cost justification is claimed fell within the 0-6 percent bracket on its schedule.

Eleven of the sixteen multi-unit chains purchasing from respondent received 12 percent discounts, four re-
1533 ceived 10 percent and one received 7 percent. It is respondent's contention that its per customer exhibits show that the discounts granted to certain of these multi-unit chains were cost justified.[1]

---

[1] Respondent granted discounts to other multi-unit chains as well as to certain independent stores, which were in excess of the discounts to which they would be entitled under respondent's discount schedule. Respondent defends the discriminatory prices resulting from these off-schedule discounts on the grounds that, in each instance, it was meeting the equally low price of a competitor. This defense will be discussed later in this opinion.

Respondent calculated its costs of serving multi-unit chains as follows. First, it proceeded on a store-by-store basis, the same as for independent store customers. It took the time required for each delivery to each store unit of the chain and computed the cost. It then figured the other costs of selling and distributing to each store unit. The costs of distribution to each unit were then totaled and this total was divided by the total dollar purchases of rebatable products of all units in the chain.[2]

Basic to respondent's cost justification defense is its contention that the combined units of a chain, and not each individual store unit, is the purchaser. Thus, following this reasoning, it is respondent's position that the calculation described in the above paragraph yields its cost per dollar of sales of serving the chain as a purchaser. On this basis, respondent's exhibits show that its costs of dealing with certain multi-unit chains receiving a 12 percent discount[3] were over 6 percent less than its costs of serving independent customers in the 6 percent discount bracket.

1534 The foregoing discussion relates to respondent's method of computing distribution costs for multi-unit chains. As to respondent's method of determining rebate bracket for multi-unit chains, it states that its policy is to total the point purchases of all the units of the chain and divide by the number of units. Respondent con-

---

[2] For an independent store customer, respondent divided the store's rebatable purchases in dollars into respondent's cost of distributing to that store to determine its cost per dollar.

[3] The corporate chains receiving 12 per cent discount, for which cost justification is claimed are Big Bear, Kroger, Joseph's, National Food, Wrigley's and Seaway Foodtown, Inc. The voluntary and cooperative groups were Red & White and Saveway.

tends that, in practice, averaging the purchases of multi-unit chains to determine discount bracket yields a discount rate which reflects the cost savings realized in serving such chains.

We have no doubt from this record that until convenient to do so after revision of its discount schedule in 1960, respondent did not determine discount brackets for multi-unit chains by averaging their purchases. Until 1960, a customer was required to purchase 40,000 or more points per month to qualify for the 12 percent bracket. It is undisputed that under respondent's alleged averaging procedure, before 1960, no chain would have qualified for the 12 percent discount. Despite respondent's arguments to the contrary, the evidence establishes that before 1960, respondent determined the discount bracket for a chain by aggregating the purchases of all the stores of that chain. The mere fact that respondent established a point requirement for a discount bracket that could only be attained by aggregating purchases is a clear indication of its policy. Moreover, respondent's own reasons as to why it added a 12 percent bracket to its schedule shortly after it was initiated confirms its policy of aggregating purchases.

In brief, respondent states that the 12 percent bracket was added after it conducted a special time study in 1955 for the Kroger stores and determined that a 12 percent discount would be warranted to an account with Kroger's volume. The 40,000 point requirement respondent then established for the 12 percent bracket could only be attained by aggregating the volume of all Kroger stores. The manager of respondent's Toledo plant testified unequivocally that the 12 percent discount granted to Kroger was based on the discount schedule (tr. 3112). Moreover, he testified that all of the discounts granted in the Toledo

area were in accordance with the schedule. The evidence discloses that none of the multi-unit chains could have attained the discounts they received under the schedule other than by aggregating purchases of all units. 1535 Other evidence of record fully establishes that it was respondent's policy to determine discount bracket for chains by aggregating purchases.[4]

Respondent vigorously denies that it aggregated the purchases of chain units to determine discount bracket, contending that it was forced to go off schedule (*i.e.*, grant a 12 percent discount to certain chains that did not attain the required 40,000 points by averaging) because of competitive pressures. In 1960, however, respondent rectified this off schedule situation for chains claimed to be cost justified by the simple expediency of reducing the point requirements for the 12 percent bracket to 10,000. Subsequent to that time, with respect to discount schedule administration, any chain could obtain a 12 percent discount under the schedule if the total point purchases of all of the units divided by the number of units, exceeded 10,000 points. As before noted, respondent argues that for cost justification purposes, this procedure yields a discount rate which reflects cost savings. In any event, whether the 12 percent discount is considered to be off schedule (prior to 1960) or on schedule, it is respondent's contention that for cost justification purposes, the cost that is to be considered in dealing with a chain is that derived from totaling the distribution cost to each store of a chain, whether large or small, and dividing by the total purchases of these units.

The hearing examiner rejected respondent's cost justification defense, in part, for the reason that discounts to

---

[4] Tr. 149, 249, 283, 2434-35, 2970, 3033, 3063, 3066, 3071, 3141, 3181-82 and 3258-59.

multi-unit purchasers must be cost justified on a store-by-store basis. We agree.

Just as the practice of aggregating purchases of chain units to determine bracket has no relation to the costs of dealing with the chain, so the averaging of purchases has no relationship to the costs actually incurred in dealing with each store.

1536 The perishable nature of the product involved, milk, precludes central warehousing. Therefore, with the exception of centralized billing for chains, which is not a significant factor in the cost study, respondent's milk is physically distributed to each store of a chain in identically the same manner as to an independent competitor. Thus, the largest independent customer respondent has in this area received only a 6 percent discount whereas a competing chain store unit of the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership in the chain. In effect, each chain is considered as a separate class of purchaser apart from the independents. Obviously, mere membership in this class does not lessen the cost of dealing with a store.

Respondent's cost study is based on a time-volume relationship, *i.e.*, that it takes less time per unit to deliver a large volume of milk than a smaller volume. The cost savings which respondent allegedly realizes in dealing with a mulit-unit chain arises principally from the time saved in making delivery to the large volume stores of the chain. In practice, therefore, respondent takes the *over cost justification* in delivery to the large stores of a chain and credits this time saved to the smaller stores.

In our view, this is not a valid costing procedure under the Robinson-Patman Act. The primary purpose of this statute is to curb excessive concessions secured by chain buyers in competition with independent stores. It was

designed to limit discounts as "instruments of favor and privilege and weapons of competitive oppression." To permit the cost procedures advocated by respondent defeats this purpose. From the standpoint of competition, respondent's method of determining cost for a chain is not related to the realities of the market. An independent store competes in the sale of Sealtest milk with the individual stores of a chain unit, not a hypothetical "average" store.[5]

1537 In support of its argument that it should be permitted to average the volume of a chain to determine discount bracket, respondent relies in part on the legislative history of the statute. Specifically, it quotes from that part of a House Judiciary Committee report[6] which states that physical economies that are to be found in mass buying by a chain are not disturbed by the bill. It is obvious, however, that when taken in full context, the Committee's report did not have reference to economies in mass buying in the sense employed by respondent. The report deals with mass purchasing in the sense of a large delivery to a central location with consequent savings over small deliveries to many locations. We find nothing in the reports or the debates on this bill which lend support to respondent's contention that Congress intended that a seller could apply any economies in dealing with a large store of a chain to its cost of distributing to a smaller chain unit to justify a discriminatory discount to the chain.

In summary, respondent, by its costing procedure, would justify two discount schedules in the Toledo-Monroe area. One, with discounts ranging from zero through 6 percent, applies to independent stores while the other, with higher

---

[5] *In the Matter of Thompson Products, Inc.*, 55 F.T.C. 1252 (1959).

[6] H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936).

brackets through 12 percent, benefits the chains. Since the competition with which Section 2(a) is concerned is between the individual stores, whether independent or a unit of a chain, such costing procedure cannot be accepted. Accordingly, we hold that respondent has failed to cost justify the discounts it has allowed to multi-unit chains in this area.

In defense of those prices resulting from the granting of discounts in excess of those to which a customer was entitled under the discount schedule, respondent contends that each of these lower discriminatory prices was granted in good faith to meet the equally low price of a competitor.[7]

1538 It is respondent's argument that it was meeting a competitor's price within the requirements of Sectoin 2(b) by matching the competitor's discount.[8] In its appeal brief (p. 87) respondent states that "* * * when Sealtest met a competitor's rebate, it no more than met the 'equally low price of [the] competitor' on a net price basis."

Obviously, this argument is valid only if, as further contended by respondent, the wholesale list prices of the competitors whose lower prices respondent claimed to be meeting were similar to respondent's. The hearing examiner held that respondent failed to make this showing. We

---

[7] These customers include Associated Grocers (AG), Sears, Bellman's, Tri County Super Dollar, Foodtown (Monroe), Casper-Miglore's, People's, La Plant, Country Market, Save Mor, Segur, Prescott, Mullen's, Nancy's, Hoffman's, A & P and New Beer Stop-State Park Beer Stop-Golden Drumstick.

[8] Section 2(b) of the statute provides that a seller may rebut a prima facie case of price discrimination "by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low *price* of a competitor * * *" (emphasis added).

recognize, in this regard, that the examiner's ruling imposes too strict a burden upon respondent by requiring that it show the actual list prices of its competitors. The good faith requirement of Section 2(b) does, however, impose upon respondent the burden of showing the existence of facts which would lead a reasonable person to believe that the wholesale list price from which respondent granted its discount was no lower than the wholesale list price of the competitor whose price it was allegedly meeting. *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945). Respondent has failed in this burden.

We first point out that respondent's defense differs from that recently considered by the court in the *Callaway Mills* case. *Callaway Mills Co.* v. *Federal Trade Commission*, . . . F.2d. . . . . (5th Cir. 1966). In that case Callaway adopted an annual quantity discount schedule ostensibly to meet discount schedules offered by its competitors. The evidence established that Callaway sold only a tufted line of carpeting whereas its competitors sold both woven and tufted lines. Additionally, Callaway's line was smaller and less expensive than its competitors'.

In determining the validity of Callaway's defense under Section 2(b), the court examined in detail the manner in which carpeting is sold. It referred to the fact that each manufacturer makes a wide variety of carpeting of different quality and that often there is a difference in construction, design, patterns, colors, or materials between carpets selling at the same price level. Moreover, the court found that the Callaway discount schedule, and that of its competitors, applied to their full line of carpets, regardless of the type or price.

1539 It was the court's conclusion that "In the circumstances and under the facts of this case, Callaway * * * could in 'good faith' attempt to meet the competition

by granting similar volume discounts especially since no workable alternative is evident."

In the case before us, which involves the sale of milk, none of the marketing factors which the court found to be significant in the sale of carpeting, has any application. And here, respondent does not rest its Section 2(b) defense on the granting of discounts under its discount schedule, as did Callaway. Instead, respondent argues that, in individual situations, it was meeting a competitor's equally low price, and that it was doing so by matching that competitor's discount. Therefore, as part of its good faith burden, respondent must show the existence of facts which would reasonably lead it to believe that its wholesale list prices were no lower than that of the competitor whose price it was allegedly meeting.

In support of its position, respondent relies on evidence showing a similarity of certain costs among the different dairies in this market. First, respondent points to the fact that the price of raw milk is fixed by government order so that all dairies purchase raw milk at the same price. Second, respondent states that labor costs tend to be the same for all dairies due to the existence of marketwide labor contracts. However, contrary to respondent's contention, the similarity of these two cost items does not provide a reasonable basis for assuming that wholesale list prices are the same, a fact of which respondent should have been well aware.

While the cost of raw milk and labor may account for a uniform cost of producing milk at the plants of the various dairies, these items fail to take into account a cost item which would substantially influence a dairy's wholesale list price. We refer to the cost of distribution. As respondent has well documented in this record, there are numerous

items of expense which must be considered in determining distribution costs.

Respondent relies to some extent upon a statement by its Toledo plant ice cream manager, in commenting on list prices for ice cream in that area, that there is an industry-wide labor contract which spells out the commission
1540 paid to drivers. Assuming that the commission paid to drivers for milk delivery is also fixed by labor contract, this is the only item of distribution cost of a competitor of which respondent could be at all certain. However, this showing is of little, if any, significance as to competitors' distribution costs. First, the commission paid to drivers accounts for less than 50 percent of the total wholesale delivery costs. Second, knowledge as to the rate of commission paid to drivers is of no consequence in the absence of information as to the competitor's volume of sales. Respondent does not claim to know the sales volume of any competitor nor does it claim to have knowledge of any facts upon which it could reasonably make this determination.

Under the circumstances, we find that respondent has failed to demonstrate any reason to believe that the wholesale list prices of competitors whose prices it claims to have met were the same as its own. Not only has respondent failed to make this showing, but the evidence clearly and convincingly discloses that the wholesale list prices of certain of these competitors were higher than respondent's.

The quantity discount schedules of certain competitors evidence this difference in wholesale list prices. Respondent states that it knew these discount schedules, and it has placed the schedules of two competing dairies in the record. One of these is Babcock Dairies, a competitor whose lower price respondent claims to have met in selling to several of its off-schedule customers.

We set forth the full Babcock discount schedule (RX 166A):

Monthly Sales	Points
900	3%
1000	4
1250	5
1500	6
1750	7
2000	8
2500	9
3000	10
5000	11
7000	12

Using the 10% bracket as an example, only 3,000 points monthly are required under the Babcock schedule while the respondent's schedule required 15,000 points. Even after respondent revised its schedule in 1960, which revision respondent contents was necessary to bring its point requirements into line with competitors' schedules, 7,000 were required.

1541 Respondent, of course, does not claim to have met a competitor's price in the granting of discounts from its discount schedule. Instead, respondent states that in granting discounts to meet a competitor's lower price, it went off schedule. Thus, a customer who claimed to have been offered a 10 percent discount by Babcock may have purchased enough points to justify that discount from Babcock. Its purchases would not be sufficient to warrant a 10 percent discount on respondent's schedule. Respondent would then go off schedule to grant the 10 percent discount.

The vital point to keep in mind in considering the different point requirements of respondent's and Babcock's schedules is that price is the one crucial item in the sale

of milk at wholesale. Retailers must carry milk and this record is replete with evidence that competition is cut-throat, to the extent that one or two cents difference on a half gallon will mean the difference between a profit or loss on milk to the grocer. Although complaint counsel attempted to establish a preference for nationally and heavily advertised brands such as Sealtest, there can be no question from this record that as to milk, a basic homogeneous product, it is the net price to the grocer which determines whether he will continue to buy or will change suppliers.

It is in this context that the various discount schedules must be considered. And it is in this context that the disparity between wholesale prices become obvious.

Let's assume, as respondent contends, that wholesale list prices are the same—using as a basis, 40 cents a half gallon. Under the Babcock schedule, a customer would be entitled to a 10 percent discount if he purchased 3,000 points a month, a net price of 36 cents. Under respondent's schedule (p. 4 of this opinion), he would just barely rate 6 percent, giving him a net price of 37.6 cents. The evidence firmly establishes that this net price difference in most instances is sufficient to divert a retailer's purchases to Babcock. We do not believe that respondent and Babcock competed on that basis. Rather, we think it obvious that Babcock's discounts were granted from a higher wholesale list price than respondent's and that Babcock competed on a net price basis by maintaining lower point requirements on its discount schedule. One thing is abundantly clear from this record, a dairy could not sell milk in this market at net prices which were consistently one or two cents above its competitors'.

There is direct testimony that there is a two cents a half gallon difference between respondent's list price and

1542 that of one competitor, Page Dairy. Page's price was two cents less a half gallon and there is no evidence as to point requirements for obtaining a discount under the Page schedule. In any event, this testimony clearly refutes respondent's basic premise upon which its Section 2(b) defense rests, *i.e.*, that wholesale list prices of those competitors whose lower prices respondent claims to have met were the same as respondent's. With the Page wholesale list price admittedly two cents less a half gallon than respondent's, there is no justification on this record for inferring, as respondent argues, that the wholesale list prices of these competitors were the same as respondent's.

While it is true that a seller claiming the meeting competition defense is not required to prove that its prices were in fact equal to those of its competitors, it must show the existence of facts which would lead a reasonable person to believe that its lower diseriminatory price would in fact meet the equally low price of a competitor. *(Federal Trade Commission* v. *A. E. Staley Mfg. Co., supra.)*

Respondent states that it knew the requirements of its competitors' discount schedules. However, the fact that respondent knew its competitors' discounts schedules does not mean that it knew, or that it had any reasonable basis to assume, that the wholesale list prices of these competitors were the same as its own. It is obvious that if respondent's milk is normally competitive at a 3 percent discount with a competitor's milk at a 6 percent discount, respondent by granting a 10 percent discount to meet the 10 percent discount on the competitor's schedule, could not claim to be meeting the competitor's lower price. In such a case, respondent would be substantially undercutting the price of its competitor by granting the same discount.

In the *Continental Baking* case (Docket 7630, Dec. 31, 1963), we dismissed a complaint charging a violation of

Section 2(a) upon the grounds that respondent had sustained its burden under Section 2(b). In that case, 1543 respondent was meeting discount offers of its competitors. We pointed out in our decision that not only were the competitors' discounts equal to or larger than Continental's but that in every instance of record, Continental's "net price to the customer was no lower than its competitors' net prices." This holding is well documented in the hearing examiner's initial decision wherein he made explicit findings as to the similarity of list prices based on the testimony of many purchasers. Thus, the factual situation in that case is far different from the case before us where we are asked to sustain a Section 2(b) defense on an inference of the identity of list prices when the facts, known to respondent, indicate to the contrary.

We hold that respondent has failed to show that there is reasonable basis for believing that it was meeting the equally low price of a competitor, as contended. We cannot now infer from a showing of similarity of certain costs that competitors' list prices were the same as respondent's and, on the basis of such an inference, further infer that respondent was either aware of this price identity at the time it granted the discriminatory price or that it at least attempted in good faith to satisfy itself that it was meeting an equally low price.

Respondent has failed to meet its burden under the meeting competition defense in still other respects. Thus, many of the discounts it seeks to justify were those in the amount of 10 and 12 percent which it granted to multi-unit chains. Much of the testimony that respondent relies upon to establish its defense is to the effect that it believed the customer because it knew that the 10 or 12 percent offered by a competitor was the highest discount bracket on the schedule of the particular competitor. In those instances

where a voluntary or cooperative chain was involved, respondent had been serving stores of the chain on an individual basis. In many instances, respondent knew that the volumes of the individual stores were small and it should thus have known that the competitor's offer was based on aggregating purchases to establish discount bracket. In fact, respondent's Toledo plant manager testified that he was told by certain of these customers that the competi-
1544 tors' offers were based on aggregating sales to determine bracket on the competitors' schedules. Knowing this and knowing that these competitors were selling to different customers at different prices, respondent was aware that the prices it was allegedly meeting were discriminatory and should have been placed on notice that such prices might not be justified by savings in cost to the competing sellers. It was therefore incumbent upon respondent to come forward with evidence showing that under the circumstances, it had no reason to believe that the prices of those competitors who were aggregating purchases were not lawful. Respondent has failed in this burden.

Specific reference is made in the initial decision to two accounts which respondent contended were granted discounts to meet competition. These were Associated Grocers (AG) and Saveway. Both of these grocers' co-operatives, the former consisting of 55 to 60 stores, while there are 6 stores in the Saveway group. Respondent introduced testimony of representatives of both these groups in support of its defense.

In brief, respondent argues that its discounts to these two groups were granted to meet the same or higher discount offers by Meadowgold. Respondent had been serving individual stores of each group before the Meadowgold offer. At least with respect to the AG group, these were practically all small stores and respondent should have

been well aware that it could not cost justify a 10 percent discount, which was the amount of the Meadowgold offer. Moreover, Meadowgold had the additional distribution expense of serving the Toledo area from Lima, a distance of some 80 miles. Therefore, we think that the Section 2(b) proviso is not satisfied by a mere showing of the Meadowgold offer. In our view, good faith in these circumstances requires an additional showing by respondent of circumstances which would lead it to believe that the Meadowgold offer could have been justified on a cost savings or some other basis.

One other aspect of respondent's discounts to AG and Saveway must be noted. Representatives of both accounts testified that they had difficulty with Meadowgold milk due to the distance it was being transported. Both testified that they intended to replace Meadowgold and that, in fact, their purchases from respondent were increasing *before* respondent offered a lower price. This, coupled with the express testimony of the Toledo plant manager (tr. 1545 283-84) that the purchases of AG and Red & White[9] were aggregated to determine discount bracket, strongly indicates that the discounts which respondent granted these two accounts were not to meet the Meadowgold offer but were the result of respondent's determination to aggregate purchases of cooperative units.

In any event, counsel supporting the complaint conclusively rebutted the evidence introduced by respondent as to its discount to Saveway by establishing that Meadowgold whose offer respondent allegedly met, withdrew entirely from the Toledo market within about six months after its offer and that, thereafter, respondent continued its dis-

[9] Saveway, which was a corporate chain, disbanded in 1958 and the stores became members of the Red & White voluntary group.

count at the same rate. Respondent failed to introduce any further evidence in support of its meeting competition defense as to this customer.

Under all of the foregoing circumstances, we find that respondent has failed to establish the good faith requirement of the Section 2(b) defense.

Memphis, Tennessee (Ice Cream)

The evidence dealing with the Memphis area relates to respondent's sale of ice cream under a monthly quantity discount schedule which was initiated in February, 1957, and to certain discounts respondent allowed which were off schedule.

The schedule, which applied to the sale of packaged ice cream, was as follows:

Gallons	Discounts per Gallon
0 - 49	0
50 - 79	2¢
80 - 109	3¢
110 - 139	4¢
140 and over	5¢

At the time this schedule went into effect, respondent was selling two brands of ice cream from its Memphis plant.

Sealtest brand, with a butterfat content of 11 percent
1546 had a wholesale list price of $1.32 per gallon. The secondary brand was Fro-Joy which had a 10 percent butterfat content and sold at $1.19 per gallon. In February, 1958, the per gallon price of Fro-Joy was reduced to $1.15.

Apart from sales under its discount schedule, respondent also sold to certain customers at a net price lower than the net price charged customers in its highest discount bracket. Respondent contends that these were specially negotiated discounts.

Most of the evidence in the Memphis area relates to the special discount respondent allowed to stores affiliated

with the Malone & Hyde organization. It is respondent's argument that Malone & Hyde is a wholesaler and the rebates it received constitute a lawful functional discount. The hearing examiner rejected this argument and we agree with the examiner.

There is very little dispute as to the facts concerning the Malone & Hyde transactions. It is established that Malone & Hyde has been engaged in wholesale food distribution in the Memphis area for over 50 years. In 1944, it organized the Malone & Hyde Cooperative Stores. At the time of the hearing, 335 independently owned retail grocery stores belonged to the organization. To qualify as a member, a retailer must do a certain volume of business and pay Malone & Hyde an annual membership fee of $364. Malone & Hyde maintains warehouses from which it supplies these stores with a full line of grocery products. Mr. Hyde testified that he sells to the member stores at the Malone & Hyde cost plus a fee of 3 percent for handling and delivery in Memphis.

In 1951, Malone & Hyde entered into an arrangement with respondent whereby it agreed to promote, sell and advertise Sealtest and Fro-Joy ice cream in the member stores. This agreement was verbal and the understanding was that on the volume of business that Malone & Hyde could produce, it would be paid 5 percent of dollar sales. Malone & Hyde retained 2 percent for credit and accounting work and for promotion, and passed 3 percent to the member stores. Under this arrangement, Malone & Hyde accepted the credit risk on all shipments to its stores and respondent billed Malone & Hyde for total deliveries.

1547 In 1954, respondent voluntarily increased the discount to 7 percent, 5 percent of which was returned to the individual stores. Finally, in 1956 (and again verbally) respondent increased the discount to 7 cents per

gallon plus a 2 percent allowance on total dollar purchases (excluding novelty ice cream items). The 7 cents was returned to the member stores and Malone & Hyde retained the 2 percent allegedly as compensation for advertising, to handle billing and for assumption of credit risk incurred by respondent in selling to the stores.

There were at least 190 Malone & Hyde stores receiving ice cream from respondent. The 7 cent discount applied to their purchases of both Sealtest and Fro-Joy ice cream. Subsequently, at the request of Malone & Hyde, respondent began furnishing these stores with a private label ice cream known as Hyde Park, which was of the same grade and quality as Fro-Joy. Although the exact date on which this delivery began is not in evidence, the record establishes that the stores were receiving Hyde Park in 1959 at a wholesale price of $1.05 per gallon less 7 cents per gallon discount, at which time the wholesale price of Fro-Joy was $1.15. The record discloses that in a one month period in 1959, respondent sold over 8,600 gallons of ice cream to Malone & Hyde stores. Of this total, which constituted over 70 percent of respondent's volume in Memphis, 40 percent represented sales of Hyde Park.

The circumstances are such that there is very little difference between the manner in which a Malone & Hyde member store is serviced by respondent as compared to a non-member retail customer. In both cases, respondent receives orders directly from the store, delivers the ice cream directly to the store and services the cabinets. Whereas an independent store owner may pay the deliveryman, the Malone & Hyde store is furnished with a copy of the invoice and the original is sent to Malone & Hyde headquarters. Once a week, respondent bills Malone & Hyde for all stores and receives a check drawn on the Malone & Hyde account.

1548 In arguing that Malone & Hyde is the purchaser and thus entitled to a functional discount, respondent alleges that it has nothing to do with the price at which its ice cream is sold to the stores. However, the record contains numerous copies of invoices to Malone & Hyde stores and on each, the price per gallon of both Sealtest and Hyde Park ice cream is specified. Moreover, respondent regularly sends to Malone & Hyde headquarters a recapitulation sheet which shows not only the number of gallons each member store purchased (by name) but also the amount of refund due each store. Likewise, the 10 cents per gallon equipment allowance each respondent grants to stores having their own ice cream cabinets, is paid directly to the member stores. And, finally, the fact that part of the 2 percent which respondent grants to Malone & Hyde is for assuming the credit risk of the member stores is consistent only with the fact that the parties themselves regard the member stores as the purchasers. Obviously, were Malone & Hyde the purchaser, there would be no risk involved to respondent insofar as the credit of the stores is concerned.

Considering the facts of the record, the Commission concludes that respondent's sales of ice cream were made to the member stores of the Malone & Hyde organization and that these stores performed no function different from that performed by their competitors who purchased respondent's ice cream. This is not to say that Malone & Hyde could not perform services for respondent and be reimbursed therefor. Presumably, 2 percent allowance received by Malone & Hyde was payment for such services and such payment is not included in our finding of a price discrimination in sales to Malone & Hyde stores.

In addition to the Malone & Hyde stores, respondent

allowed the 7 cents per gallon discount to three other Memphis customers: Food Center, a corporate chain with six stores; four or five stores of the National Food chain; and one Kroger store.

The evidence establishes the intense competition which exists in the resale of respondent's ice cream in Memphis.

There is testimony that, at the time respondent's 1549 wholesale list price for Fro-Joy ice cream was $1.15 per gallon, the retail price in the Memphis area varied from 53 cents to 59 cents a half-gallon. The testimony of respondent's competitors in this area indicates the competitive importance to retailers of a few cents difference in price. The three who testified placed the amount which would cause a retailer to switch suppliers as between 2 cents and 4 or 5 percent per gallon. The testimony of several retailers, introduced by respondent to the effect that they needed a discount in order to effectively compete, confirms the significance which they attached to lower net prices. Furthermore, the highly competitive nature of the retail ice cream business is reflected in the testimony of respondent's officials who stated that certain of their customers threatened to quit purchasing unless their discounts were raised three or four cents a gallon.

Over 200 independent stores, constituting over 50 percent of respondent's customers, received no discount. In this regard, Mr. Hyde testified that he wanted Hyde Park ice cream in order to sell at 53 cents a half gallon at a time when these 200 customers were paying $1.15 per gallon for ice cream of the same grade and quality.

Considering the facts of record, we conclude that the discounts granted by respondent, and particularly the 7 cents per gallon granted to chain customers, were substantial and had the probable effect of lessening competi-

tion between respondent's retail purchasers.[10]

We next consider respondent's argument that the discounts which it granted under its quantity discount schedule were cost justified and that its off schedule discounts were either cost justified or were granted to meet competition.

1550 Respondent conducted an extensive time study of its wholesale ice cream distribution routes in Memphis during the period from October 19 to November 18, 1959. As in the Toledo milk study, the ice cream study was made on a location-by-location basis, regardless of whether the location was that of an independent store or a store of a chain. Nine routes were studied for fifty route days, covering slightly more than 1,000 deliveries to more than 500 store locations. The time-volume relationships were analyzed on the basis of minutes per gallon delivered, total ice cream distribution expenses were determined, and these expenses were assigned or allocated to customers on the same bases [sic] as that used in the Toledo study.

We have carefully reviewed respondent's cost study exhibits and we conclude that respondent has cost justified its Memphis ice cream discount schedule *on a per location basis*. As in the Toledo study, respondent has properly

---

[10] The court in the *United Biscuit* case, in commenting on a monthly quantity discount schedule, has stated that "The apparent purpose of a graduated discount system is to afford some customers greater profits. * * * There would be no purpose for United to burden itself with maintaining its pricing practices unless it believed that the discounts are sufficiently attractive to induce a greater volume of purchases from its customers. It follows that if the discounts are intended as an inducement, necessarily they must be considered of a substantial character." *United Biscuit Co. of America* v. *Federal Trade Commission*, 350 F.2d 615, 621 (7th Cir. 1965).

computed and assigned delivery time and costs, and has assigned each location to its proper bracket on the basis of purchases. Respondent's exhibit, based on these cost studies, shows its distribution cost per gallon sold was $.6543 for the 0 bracket; $.5193 for the 2 cents bracket; $.5042 for the 3 cents bracket; $.4279 for the 4 cents bracket; and $.3394 for the 5 cents bracket. However, we reject respondent's argument that certain of its off schedule discounts are justified.

The two off schedule discounts for which respondent claims cost justification are those granted to the Malone & Hyde stores and to Food Center. In both instances, respondent claims cost justification on the basis of totaling distribution costs of all stores of the group and dividing by the total purchases. For the reasons stated with reference to the Toledo cost justification defense, this procedure is rejected. Moreover, the cost justification defense is invalid as to both of these groups for other reasons. As to the Malone & Hyde stores, the evidence[11] establishes that

1551 the average volume of purchases of the stores of that group was less than the average volume of the purchasers in the 5 cent bracket on respondent's schedule. Thus, it is obvious that there were independent stores in respondent's 5 cent bracket which had volume purchases larger than the average of the Malone & Hyde stores. In condemning this same method of classification of purchasers, the Supreme Court has stated that "Such a grouping for cost justification purposes * * * created artificial disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit."[12]

With reference to Food Center which received a 7 cents

---

[11] RX 109-A.

[12] *United States* v. *Borden Co.*, 370 U.S. 460 (1962).

per gallon discount, respondent's own cost exhibits[13] disclose that its distribution cost per gallon to stores of that chain is practically identical with its distribution cost per gallon to customers in the 5 cent bracket on its schedule. Thus, it costs respondent $.3840 per gallon to distribute ice cream to Food Center stores while its cost per gallon to customers in the 5 cent bracket is $.3869. Clearly, this cost difference of $.0029 cannot justify a 2 cents per gallon difference in price.

We hold that respondent has failed to establish that its lower net prices to Malone & Hyde stores and to Food Center were cost justified.

Respondent has presented a meeting competition defense with respect to discounts granted to certain independent stores, which discounts were in excess of those warranted by the stores' volumes on the discount schedule. Respondent's officials testified as to reports they received from customers of higher discount offers from competitors. These officials stated that they personally contacted the store owners whom they named, and they gave the time and place of the conversation, the amount of the competitor's offer, and, in most instances, the name of the competitor. Additionally, respondent introduced evidence in verification of these reports, including the testimony of certain of the customers. Counsel supporting the complaint failed to rebut this evidence and we hold, therefore,

1552 that respondent has sustained its burden of showing that its discount to each of these independent store customers was made in good faith to meet the equally low price of a competitor.

Respondent also contends that the 7 cents per gallon discount which it granted to Malone & Hyde stores,

---

[13] RX 117-A.

Kroger and Food Center were made to meet competitors' offers.

With reference to the Malone & Hyde stores, respondent introduced two letters dated in January, 1958, from Santi Ice Cream Company to Malone & Hyde offering to sell a private brand ice cream at $1.18 per gallon less 10 cents per gallon discount. As pointed out by the examiner, the discriminatory discounts were granted by respondent to Malone & Hyde stores long before these letters were sent. Moreover, the net price offered by Santi was higher than the net price respondent charged the Malone & Hyde stores for its Hyde Park ice cream, which brand accounted for nearly 40 percent of the ice cream purchased by these stores from respondent.

On this appeal, respondent now relies on the testimony of Mr. Hyde that, prior to the Santi offer, he had received similar offers from other companies which he named. Nowhere in this record is there any testimony by respondent's officials or by Mr. Hyde that either the Santi offer or any other offer by a competitor was reported to respondent. In fact, Mr. Hyde testified that he had no desire to change suppliers because of Sealtest's national advertising and consumer preference in the area. This evidence stands in sharp contrast to the evidence relied upon by respondent in support of its meeting competition defense in the granting of off schedule discounts to independent stores.

The evidence clearly establishes that respondent initiated discounts to Malone & Hyde stores and voluntarily continued and increased these discounts without regard to competitive offers. Respondent's failure to allege that it was even aware of any competitors' offers is sufficient to invalidate its argument that it was acting in a good faith effort to meet an equally low price of a competitor in granting discriminatory discounts to Malone & Hyde stores.

1553 With regard to its discounts to the Kroger store and to Food Center, although respondent generally states on this appeal that these discounts were granted to meet competition, it cites no evidence in support of this defense and we find none in this record.

Accordingly, we hold that respondent has failed to establish that its 7 cents per gallon discounts to Malone & Hyde stores, to the Kroger store and to Food Center were granted in good faith to meet an equally low price of a competitor.

New Orleans (Milk)

Respondent's New Orleans plant processes and sells fluid milk products in the New Orleans metropolitan area and had distribution branches in Baton Rouge, Louisiana, and Jackson, Mississippi. It did not have in effect any quantity discount schedule in the sale of milk during the period covered by this record. However, the record establishes that respondent granted discounts ranging from 5 percent to 10 percent off wholesale list price to at least five wholesale customers in the first seven months of 1958. During this period, respondent had over 600 wholesale customers who received no discount.

In addition to these discounts, respondent for a number of years has sold milk to its largest wholesale customer in this area at a net price lower than its net price to any other customer. The undisputed facts concerning this favored customer are as follows.

On May 21, 1951, respondent entered into a contract with H. G. Hill Stores, Inc., a chain of food stores in New Orleans, whereby it agreed to furnish that customer with fluid milk products under a private label, "Velva." By the terms of this contract, the price charged for Velva milk, which at that time was packaged only in quarts, was the Federal Milk Market Order price of raw milk plus 6

cents per quart. The contract further provided that Hill stores would use respondent's milk exclusively, except for milk supplied by St. Charles Dairy, in all of its retail 1554 stores.[14] In addition, the contract provided that respondent would sell Hill stores its Sealtest brand of milk at published wholesale list prices. The record establishes that there is no difference in grade or quality between the homogenized vitamin D and pasteurized lines of the Sealtest brand and the respective Velva private brand line.

In 1954, respondent's New Orleans plant began packaging milk in half gallon containers. Shortly thereafter, respondent entered into negotiations with the Hill stores as a result of which it began furnishing that customer with half gallons of milk under the Velva label at a price of 11 cents per half gallon over the Federal Milk Market Order price of raw milk.

About July 1, 1956, the Hill stores were acquired by Winn-Dixie Stores, Inc. Respondent continued to supply Velva brand milk to Winn-Dixie at the same price as it had to Hill stores. On October 1, 1956, the arrangement was modified and, thereafter, the price to Winn-Dixie for Velva milk became 7 cents per quart and 12.8 cents per half gallon above the Federal order price of these respective quantities.

The wholesale list prices of Sealtest brand homogenized vitamin D and pasteurized milk from respondent's New Orleans plant were as follows, beginning on the dates indicated:

---

[14] St. Charles Dairy had been the Hill stores' supplier. The record establishes that shortly after this contract, St. Charles Dairy discontinued business, leaving respondent as the exclusive supplier.

	10/28/57	6/2/58	8/1/58	9/26/58
H. V. D.	49¢	47¢	49¢	49¢
Pasteurized	47¢	45¢	47¢	47¢

During this same period of time, respondent's price to Winn-Dixie for half gallons of Velva milk, based on its contract, varied from 39 cents to 36.7 cents for homogenized vitamin D milk and from 38.9 cents to 36.5 cents for pasteurized. Thus, respondent maintained a net price of about 10 cents per half gallon less to Winn-Dixie than to its numerous other customers who received no discount.

1555 Winn-Dixie has at least 25 stores in New Orleans and respondent's plant manager testified that Winn-Dixie "pretty well blankets this area" competitively in the retail distribution of milk. Respondent's sales of Velva brand milk and milk products to Winn-Dixie for the first seven months of 1958 totaled about $386,000.

The probable adverse competitive effect stemming from respondent's lower prices to Winn-Dixie is readily apparent from this record. The testimony of one of respondent's officials establishes that the generally prevailing retail price of half gallons of milk in the New Orleans area was 49 cents. This is about the price which most of respondent's customers paid for milk. Moreover, the evidence discloses that Winn-Dixie stores regularly ran weekend specials in which they sold Velva milk at 39 cents.

Three of respondent's wholesale customers testified in this case. Their testimony establishes that milk is a very vital item in their stores, that they make only about 2 cents profit on a half gallon and that it is their experience that the housewife will shop where milk is a few cents a bottle cheaper. These retailers testified that they had lost sales due to Winn-Dixie's lower prices on milk and, in this regard, one retailer stated that a Winn-Dixie store across

the street from him sold Velva half gallons at the 39 cents price for an entire two-week period.

There can be no doubt from this record that milk is a highly competitive and very low profit item in the New Orleans area. We think it obvious that the difference between the prices which respondent sold to most of its wholesale customers and the lower prices accorded Winn-Dixie was substantial. We hold, therefore, that the effect of respondent's price discriminations may be substantially to lessen competition among respondent's wholesale purchasers.

Respondent argues that the hearing examiner erred in holding that it had failed to establish that its lower prices in the New Orleans area were granted to meet equally low prices of its competitors.

1556 As we have noted, respondent granted discounts off list prices to a few wholesale milk customers in addition to Winn-Dixie in New Orleans. With respect to these customers, respondent's officials testified as to their conversations with the owners, giving the times and places of the conversations. Respondent also identified the competitors making the offers and stated the amount of these offers. Respondent's officials testified to additional facts in verification of these reports, including the fact that in at least one instance, the competitor actually replaced respondent before respondent agreed to give the discount. Complaint counsel made no attempt to rebut this evidence. On this record, we conclude that, with respect to favored customers other than Winn-Dixie, respondent's lower prices were granted in good faith to meet the equally low prices of competitors. We hold, however, that respondent has failed to establish its meeting competition defense in the granting of discriminatory prices to Winn-Dixie.

As to the contract negotiated in 1951, respondent states

that it relied upon competitors' bids to public institutions such as hospitals, schools and naval bases. However, these bids could give very little, if any, indication as to a competitor's offer to Winn-Dixie since the sale to public institutions involved delivery to one location whereas the Winn-Dixie sale involved separate delivery to each store. It is well established that the cost of delivery is a very significant item in determining price. Moreover, the testimony of respondent's official establishes that its offer of 6 cents per quart over the Federal Milk Market Order price was based on studies made by its accountant "of the kind of goods that were to be sold and the services to be rendered."[15]

When respondent first introduced milk in half gallon containers in New Orleans in 1954, it was contacted by the owner of Hill stores, a Mr. Penick, who demanded Velva half gallons on the same price basis as Velva quarts, *i.e.*, at 6 cents above the Federal order price for a half gallon of raw milk. The representative testified that, when he
1557 told Mr. Penick this was not possible, he was told "to go back and get my costs and come back to see him." [16] Respondent's official testified that he did this and that the figures he got from his accountant showed a saving of about one and two-tenths cents for a half gallon as compared to two quarts.

When respondent's official was contacted by Mr. Penick's assistant, he did not inform him of this exact savings but offered to sell at a one cent saving for half gallons, *i.e.*, one cent less than the twelve cents above raw milk cost for two quarts. Mr. Penick then joined the negotiations and after learning of this offer, told respondent's official that

---

[15] Tr. 6143.
[16] Tr. 5864.

a Co-op at Franklinton, Louisiana, had stated they would sell Hill stores at 4½ cents per quart and 8 cents per half gallon above the respective raw milk prices.

Respondent relies on this evidence to support its defense that its price to H. G. Hill Stores and its successor, Winn-Dixie, for half gallons of milk was granted to meet the Co-op offer. We disagree.

In the first place, we think this evidence establishes that the offer to Hill stores was the result of the study by respondent's accountant and was made irrespective of any other offer. Moreover, as contrasted to the evidence respondent introduced concerning its discounts to other purchasers, it has made no showing of an attempt to verify the reported Co-op offer. That such attempt is essential to a good faith showing is evidenced by the testimony. Respondent was aware that the Co-op had been a by-product plant which "hadn't been doing so well" and was just trying to expand into the bottling field for wholesale delivery. Respondent had just completed an accounting study which showed the lowest price it could charge. Thus the alleged price offer by the Co-op should have been suspect on its face, particularly since the Co-op was located outside of New Orleans and would have the additional delivery costs. Moreover, the Co-op offer was allegedly made in 1954 in an effort to develop a new line of business. Respondent offered no evidence that this was a continuing offer to Hill stores nor is there any evidence that respondent believed the Co-op offer extended to Winn-Dixie after it succeeded the Hill stores.

1558 On this record, we find that respondent failed to show that its lower prices to Winn-Dixie were made in good faith to meet the equally low price of a competitor.

Respondent has raised two additional defenses with respect to its pricing in the New Orleans area. It refers

first to a Louisiana statute known as the Louisiana Orderly Milk Marketing Act. The evidence does not go beyond the effective date of this statute, which was August 1, 1958. As enacted, this statute banned all rebates, discounts and price concessions in the sale of milk. The statute was amended in 1962 to provide for the regulation of milk pricing by the State Milk Commission.

Second, respondent states that subsequent to the hearings in New Orleans, Winn-Dixie built its own milk plant and respondent lost the private label business.

It is the respondent's contention that these two developments render moot the issue of price discrimination as to its fluid milk sales in New Orleans. The hearing examiner rejected both of these arguments, pointing out as to the first that there was no assurance that the state statute would achieve that which a federal statute has failed to accomplish. As to the second, he held that loss of Winn-Dixie does not constitute assurance that respondent will not discriminate in favor of another customer.

We agree with the examiner. Moreover, our order will not be limited to the State of Louisiana but will extend to any area in which respondent may engage in similar price discriminations in its sale of milk.[17]

---

[17] It is interesting to note that in a very recent action, a Florida state court issued a temporary restraining order against this respondent under a Florida statute which prevents unfair discrimination in the sale of milk. In its brief in support of its interlocutory appeal from this action, respondent argues in part that the subject matter has been preempted by Federal regulation, stating that:

> "Examination would indeed reveal that the Federal regulation in this field has stretched its tenacles into every nook and cranny of commercial free enterprise and no room could be left for state supplementation. The Federal interest is so dominant and all inclusive as to preclude enforcement of state law on the same subject."

1559 One other issue is raised by respondent relating to all of the areas covered in this proceeding. Is is respondent's contention that the examiner erred throughout this proceeding in holding that its fluid milk products and its ice cream products constitute a single product line so that respondent could be enjoined from discriminating in price in the sale of both products if a violation were proved as to only one. However, since we have found a violation as to both products, we conclude that it is unnecessary to rule on this issue for the purpose of the order to be entered.

The appeal of counsel supporting the complaint places in issue the scope of the order as to both the Section 2(a) and the Section 2(d) charge of the complaint. Specifically, complaint counsel contends that the examiner erred in limiting the order to the product line of respondent's Sealtest Foods Division. It is his contention that the order should be broadened to include all food products of respondent's entire organization.

This record establishes that, prior to 1956, respondent carried on its various lines of business through subsidiary corporations. By the end of 1957, it had integrated its subsidiaries so that it was operating through seven separate divisions. Each of these divisions is separately organized and under separate management. Each manufactures and distributes its own distinct product lines, Sealtest being the only division engaged in fluid milk and ice cream operations. Due principally to the different types of products handled, the various divisions employ different distribution systems. There is no joint use of trademarks nor is there joint advertising among the divisions.

On these facts, we conclude that an order limited to the products of the Sealtest Foods Division is sufficient to afford effective relief from the practices we have found

to be unlawful. Accordingly, complaint counsel's appeal is denied.

1560 Respondent has also appealed from the hearing examiner's finding of primary line injury in each of the products in each of the areas involved in this proceeding. We have examined the evidence and we are in agreement with respondent that complaint counsel has failed to adduce sufficient evidence to establish circumstances from which it may be reasonably inferred that injury among respondent's competitors may be a result of respondent's pricing practices in any of these areas.

Respondent has not appealed from that part of the initial decision relating to the Section 2(d) charge. The only issue under this charge is the scope of order, raised by complaint counsel's appeal which we have denied. Accordingly, we are adopting the hearing examiner's findings and conclusion on the Section 2(d) issue.

On the basis of the foregoing, respondent's appeal is granted in part and denied in part, and the appeal of counsel supporting the complaint is denied. To the extent that the findings of the hearing examiner are deficient or in error, they are modified to conform to the factual findings together with the reasons and bases therefor embodied in this opinion. An appropriate order will be entered.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioners MacIntyre and Jones did not participate. Commissioner Reilly concurred and has filed a concurring opinion.

July 28, 1966

[CAPTION OMITTED]

1561 *Commissioner Elman, dissenting:*

In the leading case of *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759, the Supreme Court held that the

meeting competition defense afforded by Section 2(b) "does not place an impossible burden upon sellers". Emphasizing "the good faith requirement of the statute", the Court stated that "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price." The entire course of judicial interpretation has reflected an emphasis on realistic and common-sense applications of the defense. In the most recent case on the subject, *Callaway Mills Co.*, v. *F.T.C.*, decided by the Court of Appeals for the Fifth Circuit on June 13, 1966, the court reiterated that a seller asserting the defense need not show that his prices were in fact equal to those of competitors, but only that they reflected the response of a reasonable and prudent seller to what was believed in good faith to be the exigencies of competition.

1562 In *Continental Baking Co.*, Docket No. 7630, decided December 31, 1963, the Commission discarded the rigid, unrealistic approach which had been taken in some earlier cases. The Commission's opinion stated:

> "At the heart of Section 2(b) is the concept of 'good faith'. This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60; see *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 249-50. Such a standard, whether it be considered 'subjective' or 'objective', is inherently *ad hoc*. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.

> * * * Where, as here, a seller has affirmatively shown justification for selective price reductions, as 'good faith' responses to the exigencies of competition, Congress provided the shelter of Section 2(b)."

The approach taken in *Continental Baking* finds strong support in the decision of the First Circuit in *Forster Mfg. Co.* v. *F.T.C.*, 335 F.2d 47 (1964). In that case the Commission had held that a seller must affirmatively show that he knew the exact prices of competitors that he was meeting. In reversing the Commission's decision, the court stated (335 F.2d at 55-56):

> "We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply
> 1563 as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place. The Commission's requirement is unrealistic."

The "way of the market place" is familiar to the Commission as well as the courts. Especially where competition is most intense, sellers may have to determine or adjust price offers quickly and on the basis of imperfect knowledge or unverified information concerning their competitors' price offers. The Commission purports to accept the holding of *Staley, Forster,* and *Callaway Mills* that a seller invoking the 2(b) defense is not required to prove that his prices were in fact equal to those of his competitors. It states (p. 16) that "the examiner's ruling imposes too

strict a burden upon respondent by requiring that it show the actual list prices of its competitors." The Commission insists, however, that respondent must satisfy the burden of showing that its list prices were the same as, or no lower than, those of competitors whose prices it was allegedly meeting (pp. 16-21). For all practical purposes, the Commission is thus imposing on respondent a burden of proof no less strict and unreasonable than that imposed by the hearing examiner.

The Commission recognizes "'the intensely competitive nature of the retail milk business in this area" (p. 7). It states that the "vital point to keep in mind • • • is that price is the one crucial item in the sale of milk at wholesale. Retailers must carry milk and this record is replete with evidence that competition is cutthroat, to the extent that one or two cents difference on a half gallon will mean the difference between a profit or loss on milk to the grocer. Although complaint counsel attempted to establish a preference for nationally and heavily advertised brands such as Sealtest, there can be no question from this record that as to milk, a basic homogeneous product, it is the net price to the grocer which determines whether he will continue to buy or will change suppliers. • • • One thing is abundantly clear from this record, a dairy could not sell milk in this market at net prices which were consistently one or two cents above his competitors'." (p. 19.)

1564 As the Commission also recognizes, the record shows that bargaining between sellers like respondent and their retail customers revolves around discounts off wholesale list prices, not net prices. When respondent was told by customers that it had to match the discounts being offered by other sellers, its choice was either to meet such

competition or "get out".[1] Since "price is the one crucial item in the sale of milk at wholesale" and "it is the net price to the grocer which determines whether he will continue to buy or will change suppliers" (p. 19), the only reasonable and realistic conclusion respondent could have drawn was that it was meeting the competitive prices of other sellers when it matched the discounts which the latter were offering its customers.

To be sure, matching a competitor's discounts would not be meeting his net price where the competitor's list price from which the discount is given is lower than respondent's list price. And, of course, buyers may indeed seek to induce sellers to beat, rather than meet, one another's prices. However, the validity of a competitive response under the meeting competition defense is not to be tested by hypothetical possibilities but in the light of actual market situations. The only relevant question here is whether respondent, in the circumstances of this particular market situation, had reason to believe that in 1565 being asked to match its competitors' discounts or "get out" it was being asked to meet its competitors' prices. As the majority opinion points out, net price is determinative in this market. In the transactions here involved, it is simply not credible that respondent would

---

[1] For example, and it is only one of many in the record, respondent's Toledo area zone manager testified with reference to a conversation he had with the Big Bear supermarket's buyer at the latter's office in Columbus, Ohio:

"A. He was a buyer for the company and he said that he had been offered a discount and from the other two dairies and, therefore, we had to at least meet the discount or we went out.

"Q. Did you meet the discount that he told you he had.

"A. Yes, sir." (Tr. 2997.)

have been told to "get out" where it in fact *met* but did not *beat* a competitor's net price.

Under the majority view, respondent had a duty to "call the bluff" of the buyer. If it did so and it turned out that the buyer was not bluffing and in fact had a lower price offer from a competing seller, respondent would be "out". In that event, however, respondent—even though it lost the customer—might perhaps find some consolation in the knowledge that it was living up to the Commission's extraordinary standards of conduct for sellers in competitive markets—under which a seller in this kind of situation must run the risk of losing either a customer or an antitrust case.

By imposing on respondent the burden of showing as to each individual transaction that it knew or had reason to believe that its wholesale list prices were the same as, or no lower than, those of its competitors, the Commission is demanding the sort of evidence which, as a matter of commercial reality, will frequently be unavailable to a seller operating in the hurly-burly of the marketplace. As the court recognized in *Forster*, a buyer playing off one seller against another may hold his cards very close to the chest and not disclose the specific terms of the competing offer or the identity of the competing seller. Even if respondent had knowledge of all of its competitors' list prices, presumably that would still not satisfy the Commission unless respondent could also prove that it knew which specific competitor was making the rival price offer in the particular transaction. This is a demand for the kind of proof which the courts have held to impose an impossible burden on sellers. As a practical matter, the Commission is imposing a burden of proof on respondent which, like that imposed by the hearing examiner and which it purports to reject, is not satisfied without a showing of the

actual list prices of specific competitors.

1566 In this case, as in *Tri-Valley Packing Association*, Docket Nos. 7225 and 7496, decided July 28, 1966, the Commission requires proof by a seller that he "used reasonable diligence in verifying the existence of a lower price of a competitor". (*Tri-Valley*, p. 16) Presumably, a seller could satisfy the Commission that he "used reasonable diligence in verifying the existence of a lower price of a competitor" by showing that he called his competitor to ascertain whether the customer was truthfully quoting the competitor's price offer. This would take care of the seller under 2(b). But where would it leave him under the Sherman Act? Proof that two sellers discussed price and that they quoted the same price to a buyer is enough to send them both to jail for illegal price-fixing. In *Automatic Canteen Co.* v. *F. T. C.*, 346 U.S. 61, 73-74, the Supreme Court emphasized the duty of reconciling the Robinson-Patman Act "with the broader antitrust policies that have been laid down by Congress". The Court rejected any interpretation of the Act "putting the buyer [or seller] at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." To require proof of "reasonable diligence in verifying the existence of a lower price of a competitor" is to place sellers in a dilemma where they must run the risk of criminal prosecution under the Sherman Act in order to protect against a charge of violating the Robinson-Patman Act. This is hardly the way to "reconcile" the two Acts.[2]

---

[2] The sweeping and onerous burden on sellers which the Commission imposes in this case and in *Tri-Valley* is neither compelled nor supported by the Supreme Court's

1567 Another regrettable aspect of the Commission's decision in this case is that it appears to resurrect the notion, interred *sub silentio* in Continental Baking, that a seller claiming the 2(b) defense must affirmatively show that he had reason to believe that the competitive prices he was meeting were lawful, i.e., that "these prices could be cost-justified or otherwise excused under any of the exceptions to the prohibitions of Section 2(a)". *Tri-Valley Packing Association,* 60 F.T.C. 1134, 1173 (1962); see also *American Oil Company,* 60 F.T.C. 1786, 1812 (1962). The imposition of so rigorous and exacting a burden of proof on sellers claiming the meeting competition defense seems to be contrary to the course of judicial interpretation reflected in *Staley, Callaway Mills,* and *Forster.* As I wrote in dissent in *Tri-Valley Packing Association, supra* (p. 1176):

> "The law should not be construed as forcing a seller to compete at his peril. A 'sales manager who is trying to compete * * * is not, of course, required to become a detective or a judge.'* A businessman who must operate in the pressures of the marketplace cannot be expected to conduct a survey into his competitor's costs or to prophesy whether the competitor's lower price will later be held unlawful."

July 28, 1966

---

decision in *Staley.* The finding of the seller's lack of good faith in *Staley* was based on a whole variety of circumstances, including some "which strongly suggested that the buyers' claims [of lower prices offered by competing sellers] were without merit", and which, "all taken together," demonstrated a lack of good faith. (324 U.S. at 759)

* Corwin D. Edwards, "The Price Discrimination Law (1959), p. 567.

[CAPTION OMITTED]

1568 Commissioner Reilly, concurring:

According to the Staley decision[1] a seller is not required to justify price discriminations by showing that in fact it met a competitive price. It must show only the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. A showing that a seller met a competitor's discount, however, does not necessarily prove that the seller had reason to believe that it was meeting a competitor's price or that it believed that it was responding defensively in a situation of competitive necessity. A simple illustration will explain what I mean: suppliers A and B regularly sell the same or comparable products at discount off wholesale list prices. The list price of seller A is $1.00 and that of seller B 95¢. Because of this difference in the prices, the net prices of the two sellers are approximately the same when supplier A sells at a 10% discount and supplier B at a 5% discount, i.e., 90¢. Assume further that A and B normally compete in the sale of their products when A sells at a 10% discount and B at a 5% discount. Under these circumstances, B could not increase his discount
1569 from 5% to 10% to a particular customer and justify the discrimination under 2(b) by claiming that he was meeting A's discount. This would be true even though B testified that the customer had told him to meet the discount or "get out".

By increasing the discount to 10% the discriminator in the illustration above would have reason to believe that his lower price would in fact undercut the price of his competitor. Certainly under these circumstances proof that

---

[1] 324 U.S. 746.

he met the competitor's higher discount would not establish that he was responding in good faith to what he reasonably believed was a situation of competitive necessity or that he thought his reduced price would meet that of his competitor.

Consequently, we do not believe that we are asking too much of respondent in the present matter to show not only that it met a discount but that in meeting the discount it had reason to believe that it was meeting or responding defensively to a lower price of a competitor. In other words, respondent must, as required by *Staley*, "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

The dissent sharply criticizes the majority's holding that a price discriminator must show that he "used reasonable diligence in verifying the existence of a lower price of a competitor".[2] But this criticism comes more than 20 years too late. One of the reasons given by the Commission for rejecting the 2(b) defense in *Staley* was that respondents had granted discriminatory prices "without taking any steps to verify the existence of a lower price of a competitor." In that case, the Commission commented upon "the entire lack of a showing of diligence on the part of the respondents to verify the reports which they received,

or *to learn of the existence of facts which would lead*
1570 *a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor.*" (Emphasis added.) 324 U.S. at 759. The Court held that these circumstances, together with respondents' failure to prove that they had

---

[2] The majority so held in its opinion in the matter of *Tri-Valley Packing Association*, Docket Nos. 7225 and 7496, decided July , 1966.

taken precaution to conduct their business in such a manner as to prevent unwarranted discriminations required the conclusion that respondents had not sustained the burden of showing that their price discriminations were made in good faith to meet the lower prices of competitors.

The dissent holds that "To require proof of 'reasonable diligence in verifying the existence of a lower price of a competitor' is to place sellers in a dilemma where they must run the risk of criminal prosecution under the Sherman Act in order to protect against a charge of violating the Robinson-Patman Act" (dissent, page 6). To my knowledge, no price discriminator has yet gone to jail because he made an effort "to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor." Moreover, I can only assume that if the position expressed in the dissent had any merit it would have occurred to the Supreme Court and influenced its holding in *Staley*.

July 28, 1966

UNITED STATES OF AMERICA

BEFORE

Federal Trade Commission

In the Matter of	Docket
NATIONAL DAIRY PRODUCTS CORPORATION	No. 7018

COMPLAINT

2 The Federal Trade Commission, having reason to believe that National Dairy Products Corporation has violated and is now violating the provisions of sub-sections (a) and (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), hereby issues its complaint charging as follows:

Count I

Charging violation of sub-section (a) of Section 2 of the Clayton Act, the Commission alleges:

PARAGRAPH ONE: Respondent named herein is National Dairy Products Corporation. Respondent is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Respondent's principal office and place of business is located at 260 Madison Avenue, New York City, New York.

PARAGRAPH TWO: Respondent is extensively engaged in the business of purchasing, manufacturing, processing, distributing, and selling dairy and allied products in various states of the United States and in the District of Columbia.

Since respondent's incorporation on December 8, 1923, it has acquired the entire stock or control of assets of numerous concerns. Respondent, formerly a holding company, in 1956

carried forward a program of integration and corporate simplification, taking over properties and assets of more than forty principal domestic subsidiaries and continuing their operations as divisions. Respondent has also caused a number of its subsidiaries to be merged with one another. As of December 31, 1956, respondent held 100 % of the voting stock in its remaining subsidiaries, being about forty in number. Respondent's program of integrating its subsidiaries is now wholly or substantially completed.

Respondent conducts its business through its divisions and subsidiaries. Through its Sealtest division, respondent sells milk, vitamin D milk, homogenized milk, concentrated fresh milk, chocolate milk, buttermilk, cream, butter, eggs, cottage cheese, special milks, and other daily products to homes, restaurants, stores, hospitals, hotels, and institutions in states in the Eastern, Midwestern, and Southern parts of the United States, including the District of Columbia. Respondent has numerous ice cream brands sold sectionally in various parts of about 33 states and in the District of Columbia, primarily in the Eastern part of the United States.

Respondent is the largest distributor and seller of dairy products in the United States. Respondent's net sales for 1956 were $1,352,878,027.00.

PARAGRAPH THREE: Respondent sells dairy products of like grade and quality to a large number of purchasers located in many states of the United States, particularly in those of the East, South, and Midwest, and in the District of Columbia for use, consumption, or resale therein.

Respondent maintains and operates a large number of receiving stations, manufacturing, and processing plants and distribution depots located in or near the cities, towns, and places where it sells its said products. The bulk of respond-

ent's said products are delivered to its customers in its own trucks.

PARAGRAPH FOUR: In the course and conduct of its business respondent is now and for many years past has been shipping dairy products from the state or states where such products are manufactured, processed, or stored in anticipation of sale and shipment, to purchasers located in other states of the United States and in other places under the jurisdiction of the United States, including the District of Columbia in a constant current of commerce as "commerce" is defined in the Clayton Act. Respondent also sells its said products in commerce as "commerce" is defined in the Clayton Act to purchasers located in the same states where such products are manufactured, processed, or stored in anticipation of sale.

4 Included among respondent's plants and facilities for the manufacture, processing, and sale of dairy products, respondent owns and operates a manufacturing and processing plant located in the City of Toledo, Ohio, where it manufactures and processes substantial quantities of its dairy products which respondent sells in Ohio and Michigan. Other substantial quantities of said products are manufactured and processed in other states by other divisions, plants, or subsidiaries of respondent, which respondent ships or causes to be shipped to respondent's Toledo, Ohio, plant for subsequent distribution and sale. Some of such products are shipped in packages ready for sale and others are shipped in bulk and are further processed in respondent's Toledo plant for subsequent sale. Raw milk is purchased by respondent from farmers and dairymen located both in Ohio and in other states, including Michigan, which is shipped and transported to respondent's Toledo, Ohio, plant, where it is processed and subsequently sold to purchasers located in Ohio and Michigan. Respondent owns or operates a depot and sales office in Monroe, Michigan, to which its said products are transported or caused to be transported by respondent from its Toledo, Ohio, plant for subsequent sale in Michigan.

Respondent transports, or causes to be transported, substantial quantities of its said products in respondent's own trucks from respondent's Toledo, Ohio, plant into Michigan which respondent sells and delivers to customers located in Michigan. In other instances respondent sells its said dairy products to distributors who transport said products from Toledo, Ohio, to various cities, towns, and places in Michigan, principally nearby to Monroe, Michigan, who sell the same to customers in those areas. Respondent has been and is engaged in a constant and uninterrupted trade in its said products in interstate commerce in sales of its dairy products in the States of Ohio and Michigan, as herein alleged.

PARAGRAPH FIVE: The bulk of respondent's wholesale business is done with retailers such as stores, restaurants, hotels, and other businesses and establishments which resell to consumers.

Respondent, in the sale of its said products to retailers and consumers, is in substantial competition with other manufacturers, processors, distributors, and sellers of dairy products. Many of respondent's retailer-customers as herein described are in substantial competition with one another in the resale of respondent's said products to consumers.

PARAGRAPH SIX: In the course and conduct of its business and commerce, respondent has discriminated in price in the sale of dairy products by selling such products of like grade and quality at different prices to different and competing purchasers.

Included among such sales at discriminatory prices were sales of milk and other dairy products by respondent, particularly those made by and through its Sealtest division, in the Cities of Toledo, Ohio, and Monroe, Michigan, and in nearby cities, towns, and places in Ohio and Michigan.

One of the methods and plans used by respondent to effect and carry out such discrimination in price is a quantity discount or rebate schedule or system applicable to its retailer-customers located or doing business in the areas of Ohio and Michigan hereinbefore described, which respondent formulated and put into effect on or about November 1, 1954, and which with certain changes therein, is still in force and effect.

Respondent's quantity discount and rebate plan is applied to the monthly purchases by its retailer-customers of respondent's dairy products computed in points including all kinds of fluid milk and buttermilk, half and half, whipping cream, coffee cream, sour cream, and cottage cheese. Each fluid milk product and cottage cheese is assigned a given number of points, as follows:

1 quart milk (all kinds)	1 point
1 " half and half	2 points
1 " whipping cream	8 "
1 " coffee cream	4 "
1 " sour cream	4 "
1 " buttermilk	1 point
5 pound carton cottage cheese	5 points

Respondent's monthly quantity discount and rebate schedule as amended and effective in 1956, based upon respondent's point system and showing the average number of retailer-customers in each discount bracket and the percentages of discounts or rebates received for the months of March, August, and November 1956, is as follows:

Points	No. of Customers		Percent
0 to 699	Toledo, Ohio	414	
	Monroe, Mich.	109	None
700 to 999	Toledo, Ohio	64	
	Monroe, Mich.	7	2%
1,000 to 1,499	Toledo, Ohio	59	
	Monroe, Mich.	12	3%
1,500 to 1,999	Toledo, Ohio	28	
	Monroe, Mich.	9	4%
2,000 to 2,999	Toledo, Ohio	17	
	Monroe, Mich.	8	5%
3,000 to 4,999	Toledo, Ohio	10	
	Monroe, Mich.	9	6%
5,000 to 6,999	Toledo, Ohio	3	
	Monroe, Mich.	1	7%
7,000 to 9,999	Toledo, Ohio	1	
	Monroe, Mich.	None	8%
10,000 to 14,999	Toledo, Ohio	3	
	Monroe, Mich.	None	9%
15,000 to 24,999	Toledo, Ohio	13	
	Monroe, Mich.	2	10%
25,000 to 39,999	Toledo, Ohio	1	
	Monroe, Mich.	None	11%
40,000 and over	Toledo, Ohio	9	
	Monroe, Mich.	4	12%
Total number of customers		783	

Respondent's sales of its products in Toledo, Ohio, and Monroe, Michigan, including sales made in nearby cities and towns amounted to $8,605,115.31 for the year 1956. Many of respondent's retailer-customers in these areas were large chain stores and other stores having a common ownership or control, including voluntary associations or groups of stores having a central buying office. In the quantity discount schedule hereinabove set forth, such customers are shown as a unit, regardless of the number of individual stores involved

7 for the reason that respondent in computing the volume of monthly purchases of such customers pays or credits its monthly quantity discount or rebate according to the rate applicable to the aggregate purchases of all stores in the chain or central buying group without regard to the monthly volumes of purchases of such individual stores. If purchases by such customers are paid for in cash respondent rebates the discount at the end of each month by check. In the case of credit sales the discount is credited on the monthly bills. Many of the individual stores in Michigan belonging to a chain and sold respondent's dairy products by respondent's independent distributors are paid the discount or rebate applicable to the aggregate purchases of all the stores of the chain. Respondent accomplishes this by requiring its independent distributors to pay 7% of the discount and respondent pays the balance of 5% of the maximum discount to the chain's headquarters. All of the large chain stores and central buying groups are paid the maximum discount or rebate by respondent on purchases made by all their stores located in Toledo, Ohio, and Monroe, Michigan, and elsewhere.

The more numerous of respondent's retailer-customers are those who receive no discounts or rebates under respondent's monthly quantity discount and rebate plan and those customers whose purchases fall within the smaller discount and rebate brackets under said plan. These are the small, usually independent retailer-customers who compete with the large chain and central buying groups which respondent's discount and rebate system is principally designed to favor and whose volume of purchases in most instances falls within the highest brackets of said quantity discount schedule.

PARAGRAPH SEVEN: The effect of said discrimination in price by respondent in the sale of dairy products has been or may be substantially to lessen, injure, destroy, or prevent competition:

(a) between respondent and its competitors in the sale and distribution of dairy products;

(b) between retailer-purchasers of said products receiving such discounts and rebates computed by the percentages of each bracket of said quantity discount and rebate schedule and competing retailer-purchasers receiving none;

(c) between retailer-purchasers of said products receiving such discounts and rebates computed by the percentages of higher brackets of said quantity discount and rebate schedule and competing retailer-purchasers receiving such discounts and rebates computed by the percentages of lower brackets.

8 PARAGRAPH EIGHT: The discriminations in price as herein alleged are in violation of sub-section (a) of Section 2 of the Clayton Act.

Count II

Charging violation of sub-section (d) of Section 2 of the Clayton Act, the Commission alleges:

PARAGRAPH NINE: Paragraphs One through Five of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH TEN: In the course and conduct of its business in commerce, as aforesaid, respondent has paid or contracted for the payment of money, goods, or other things

of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the handling, sale, or offering for sale of respondent's dairy products and respondent has not made or contracted to make such payments, allowances, or consideration available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Included among such discriminatory and disproportionate allowances respondent has paid and allowed advertising and promotional allowances in connection with the resale of its said products to some of its customers while not offering such payments and allowances to other competing customers. As illustrative of such practices, respondent has paid certain amounts of money to selected customers, principally to large grocery store chains on openings of new stores, special advertising events, and other advertising campaigns where such advertising includes Sealtest products. Many of respondent's dairy products are sold to the public under the trade name "Sealtest". In such instances the advertising copy is prepared and paid for by the customer at the local newspaper rate, sometimes at discounts, and respondent pays said favored customer on the basis of national line rates, which are much higher than the local or discount rates which the advertiser is required to pay to the newspaper. Respondent has not offered such allowances and payments to many of its customers who compete with those who receive
9 such benefits. Many of such discriminatory payments and allowances as herein alleged have been made by respondent to its customers located and doing business in Toledo, Ohio, and in Monroe, Michigan, as well as in other places and towns in the States of Ohio and Michigan.

PARAGRAPH ELEVEN: The acts and practices as alleged in Paragraphs Nine and Ten above are in violation of sub-section (d) of Section 2 of the aforesaid Clayton Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 31st day of December, A. D., 1957, issues its complaints against said respondent.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the 10th day of March, A. D., 1958, at 10 o'clock is hereby fixed as the time and Federal Trade Commission Office, U. S. Court House, Foley Square, New York, N. Y., as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial, or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate

order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order and, thereafter, to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 31st day of December, 1957.

By the Commission.

/s/ ROBERT M. PARRISH,
Robert M. Parrish.
Secretary.

[CAPTION OMITTED]

ANSWER

17 Respondent, National Dairy Products Corporation, hereinafter referred to as "National", by its attorneys, reserving all rights hereafter to make any motions which may be appropriate, files its Answer as herein set forth:

Count I

1. Admits the allegations of PARAGRAPH ONE.

2. Denies the allegations of PARAGRAPH TWO, except that it admits that National is engaged in the business of purchasing, manufacturing, processing, distributing and selling dairy products and other products in various states of the United States and in the District of Columbia, and that two subsidiary corporations are engaged in the dairy business, one in New York and one in New Jersey.

18 Admits that since its incorporation on December 8, 1923, National has acquired the stock or assets of some concerns. Admits that National is a holding and an operating company. Admits that in the years 1956-57 National integrated into the corporation the properties and assets of more than 40 domestic subsidiary corporations, some of which have operated since that time as separate divisions and others of which became parts of divisions. Admits that in the course of its integration program some of National's

subsidiaries were merged with one another. Admits that as of January 1, 1958, National held 100% of the voting stock in its remaining domestic subsidiaries, which as of that date were four in number.

Admits that National conducts its business through its divisions. Admits that National has an administrative division in the corporation named the "Sealtest Division"; but denies that the Sealtest Division is an operating division, or itself sells any products. Alleges that the Sealtest Division, subject to the Board of Directors, the Executive Committee and the President of National, has general supervision over all of National's fluid milk and ice cream divisions and subsidiaries, which for convenience are herein referred to as the "Sealtest divisions". Admits that the Sealtest divisions sell a diversified line of dairy products, including such products as milk, Vitamin D milk, homogenized milk, concentrated fresh milk, chocolate milk, buttermilk, cream, butter, eggs, cottage cheese, special milks, and other dairy products, but not every Sealtest division sells each of such products. Admits that the Sealtest divisions sells dairy products to homes, restaurants, stores, hospitals, hotels and other customers in certain areas in the Eastern, Midwestern and Southern parts of the United States, and including the District of Columbia. Admits that certain of the Sealtest divisions sell ice cream, and that such sales of ice cream are made under several brand names in various parts of 37 states in the Eastern, Midwestern and Southern parts of the United States and the District of Columbia.

Admits that the net sales by National and its domestic and Canadian subsidiaries of all products in 1956 were approximately $1,352,878,000.

3. Denies the allegations of PARAGRAPH THREE,

except that it admits that certain of the Sealtest divisions sell a number of different kinds of dairy products to a large number of purchasers located in different states of the United States, including the Eastern, Southern and Midwestern parts thereof, and in the District of Columbia, for use, consumption, or resale therein, and that some of such products sold to some of such purchasers are of like grade and quality.

Admits that certain of the Sealtest divisions maintain and operate receiving stations, manufacturing and processing plants and distribution depots, located in or near some of the cities, towns and places where they sell their dairy products. Admits that some part of the dairy products distributed by the Sealtest divisions are delivered to customers in National's own trucks.

4. Denies the allegations of PARAGRAPH FOUR, except that it admits that for many years past certain of National's subsidiaries shipped dairy products from the state or states where such products were manufactured, processed or stored to other states and other places under the jurisdiction of the United States, including the District of Columbia, in which they were subsequently sold to customers; and admits that since 1956 certain of the Sealtest divisions have shipped dairy products from the state or states where such products are manufactured, processed or stored to other states and the District of Columbia, in which they were subsequently sold to customers. Admits that certain of the Sealtest divisions also sell dairy products to purchasers located in the same states where such products are manufactured, processed, or stored, but denies that such sales are made in commerce as "commerce" is defined in the Clayton Act.

Admits that one of the Sealtest divisions maintains a

manufacturing and processing plant in Toledo, Ohio, where it manufactures or processes a variety of dairy products which are ultimately sold to customers in Ohio and Michigan. Admits that some products manufactured or processed in other plants of National are shipped to the Toledo plant
21 and are thereafter distributed and sold. Admits that some of such products are shipped in packages ready for sale, and others are further processed or packaged before they are resold. Admits that the Toledo plant purchases raw milk from farmer-producers whose farms are located in Ohio and Michigan, which milk is processed at the Toledo plant and ultimately distributed to customers in Ohio and Michigan. Admits that one of the Sealtest divisions maintains a sales office and distributing branch in Monroe, Michigan, and that all products delivered to customers in Michigan by said branch are first transported from the Toledo plant to the Monroe, Michigan, branch and ultimately sold in Michigan. Denies that the Toledo plant transports dairy products in its own trucks from the Toledo plant directly to customers in Michigan. Admits that the Toledo plant sells some dairy products to distributors who cause such products to be transported to their customers, some of whom are located in Ohio and some of whom are located in Michigan. Denies that National was prior to 1956 engaged in interstate commerce in the sale of dairy products in Ohio and Michigan as alleged in PARAGRAPH FOUR; but admits that the Toledo plant is now engaged in manufacturing or processing dairy products some of which are ultimately sold in Michigan.

5. Denies the allegations of PARAGRAPH FIVE, except that it admits that the Sealtest divisions make sales to retail stores, restaurants, hotels, and other establishments which resell to consumers.

22 Admits that the Sealtest divisions, in the sale of dairy products to all of their customers, are in substantial

competition with other sellers of dairy products. Admits that some of the retailer-customers of the Sealtest divisions compete with one another in the resale of National's products to consumers.

6. Denies the allegations of PARAGRAPH SIX, except that it admits as follows:

a) One of the Sealtest divisions sells milk and other dairy products in Toledo, Ohio, and Monroe, Michigan, and in nearby cities, towns and places in Ohio and Michigan.

b) On or about November 1, 1954, the Toledo plant and Monroe distributing branch put into effect a quantity discount or rebate schedule applicable to certain dairy products purchased by their wholesale customers. As modified in March 1955 and August 1956, said schedule is still in effect.

c) Under the said discount or rebate schedule, wholesale customers' purchases of certain dairy products are cumulated monthly according to a point schedule. The following dairy products are now assigned points as set forth below:

1 quart whole white milk	1 point
1 " chocolate milk	1 point
1 " skim milk	1 point
1 " buttermilk	1 point
1 can Reddi Whip	1 point
1 quart half and half	2 points
1 " coffee cream	4 points
1 " sour cream	4 points
5 lb. carton cottage cheese	5 points
1 quart whipping cream	8 points

d) The table set forth below shows for the said discount or rebate schedule: (1) the discount or rebate brackets according to the number of points earned; (2) the percent of discount or rebate applicable to each bracket; and (3), to the best of National's present knowledge, the approximate average number of wholesale customers in each bracket, served by the Toledo plant and Monroe branch separately, for the months of March, August and November 1956.

24

(1)	(2)	(3)	(4)
		Number of Customers	
Points	Per Cent	Toledo, Ohio	Monroe, Mich.
0 to 699	None	414	109
700 to 999	2%	64	7
1,000 to 1,499	3%	59	12
1,500 to 1,999	4%	28	9
2,000 to 2,999	5%	17	8
3,000 to 4,999	6%	10	9
5,000 to 6,999	7%	3	1
7,000 to 9,999	8%	1	None
10,000 to 14,999	9%	3	None
15,000 to 24,999	10%	13	2
25,000 to 39,999	11%	1	None
40,000 and over	12%	9	4
Total number of customers		622	161

e) The total gross sales, including retail, wholesale and distributor sales, of fluid milk products by the Toledo plant and Monroe distributing branch in 1956 were $8,605,115.31. Included among the customers of the Toledo plant and Monroe distributing branch are stores having common ownership or control, and voluntary associations or groups of stores having a central office. In column (3) and in column (4) above each customer is counted once, without regard to the number of stores or other outlets represented by such customer.

f) In computing discounts or rebates, the monthly purchases by each customer of products to which the
25 schedule applies are aggregated in the case of multi-unit customers [and bracket is determined by averaging such aggregate purchases.]* Some customers receive the rebate in the form of a credit on their accounts while others receive it in the form of a rebate check. In the case of multi-unit customers, having units served by distributors, the purchases by such units of products covered by the schedule are combined with those of other units of such customers for the purpose of applying the discount or rebate schedule. These customers currently earn and receive a 12% discount or rebate, shared 5% by the Toledo plant and 7% by the distributor.

g) Alleges that multi-unit customers and voluntary association customers receive varying discounts or rebates from time to time, depending on the volume of their purchases.

h) A majority of the Toledo and Monroe customers receive no discount or rebate, or receive less than the maximum discount or rebate.

7. Denies the allegations of PARAGRAPH SEVEN of the Complaint.

8. Denies the allegations of PARAGRAPH EIGHT of the Complaint.

Further answering Count I, National alleges that such differentials in prices charged make only due allowances for differences in the cost of manufacture, sale, or delivery

*Added by order of the Hearing Examiner, dated May 21, 1962, as amended by order of the Hearing Examiner, dated July 18, 1962.

resulting from the differing methods or quantities in
26 which products are sold or delivered; and that the lower price or prices were made in good faith to meet the equally low price or prices of a competitor or competitors.

[Further answering, National alleges that in the absence of a clear and concise factual statement sufficient to inform it with reasonable definiteness of the types of acts or practices alleged to be unlawful, the plant or plants and the dairy product or products intended to be included in the complaint allegations, if any other than those relating to fluid milk in the Toledo, Ohio and Monroe, Michigan areas, National cannot plead affirmatively any of the defenses available to it with respect to the allegations in PARAGRAPH SIX other than those relating to fluid milk in the Toledo, Ohio and Monroe, Michigan areas and reserves the right to amend its answer with respect thereto when the issues are clarified by a pre-trial conference or otherwise.]*

Count II

9. For its answer to PARAGRAPH NINE of the Complaint, National repeats Paragraphs 1 through 5 of its Answer to Count I, as set forth above.

10. Denies the allegations of PARAGRAPH TEN, except that it admits as follows:

a) Many dairy products are sold to the public under National's "Sealtest" trademark.

b) In connection with the sale of fluid milk products
27 to wholesale customers by the Toledo plant and Monroe distributing branch, some customers have received pay-

*Deleted by order of the Hearing Examiner, dated May 21, 1962, as amended by order of the Hearing Examiner, dated July 18, 1962.

ments or allowances, available to all customers on proportionally equal terms, for newspaper advertising of selected Sealtest products on special occasions such as anniversary promotions and openings of new stores. In such instances the advertising copy was prepared by the customer and paid for by him at the local line rate and such customer was reimbursed for the Sealtest part of the advertising at the same rate, except that, according to National's information and belief, for a period of one week in 1957, the Toledo plant paid to a customer the national line rate for all newspaper advertising space used by such customer during such week for Sealtest dairy products, which offer was available to all dealers in the area.

11. Denies the allegations of PARAGRAPH ELEVEN of the Complaint.

Further answering Count II, National alleges that payments for such advertising services were made in good faith to meet payments for such services made or offered by a competitor or competitors.

Further answering, National alleges that in the absence of a clear and concise factual statement sufficient to
28 inform it with reasonable definiteness of the types of acts or practices alleged to be unlawful, the plant or plants and the dairy product or products intended to be included in the complaint allegations, if any other than those relating to fluid milk in the Toledo, Ohio and Monroe, Michigan areas, National cannot plead affirmatively any of the defenses available to it with respect to the allegations in PARAGRAPH TEN other than those relating to fluid milk in the Toledo, Ohio and Monroe, Michigan areas and reserves the right to amend its answer with respect thereto when the issues are clarified by a pretrial conference or otherwise.

Respectfully submitted,

/s/ Robert S. Gordon
Robert S. Gordon

260 Madison Avenue
New York 16,
New York
Telephone:
Murray Hill 6-6100

/s/ John T. Chadwell
John T. Chadwell
135 South La Salle St.
Chicago 3, Illinois
Telephone:
RAndolph 6-2545

March 24, 1957

Snyder, Chadwell, Fagerburg
& Keck
135 South La Salle Street
Chicago 3, Illinois
Telephone: RAndolph 6-2545
Of Counsel

Section 11 of the Clayton Act, 38 Stat. 734, As Amended, Prior to July 23, 1959, 15 U.S.C. 21 (1958 ed.).

Sec. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good

cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share, capital, or assets, held or rid itself of the directors chosen contrary to the provisons of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined

therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of title 28, United States Code.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the

filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

FINALITY ACT OF 1959

PUBLIC LAW 86-107; 73 STAT. 243

[S. 726]

An Act to amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

(a) The first and second paragraphs of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21),[17] are hereby redesignated as subsections (a) and (b) of such section, respectively.

(b) The last sentence of the second paragraph of such section which has been hereby redesignated as subsection (b) is amended to read as follows: "Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportu-

---

[17] 15 U.S.C.A. § 21.

nity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section."

(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:

"(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its

judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

"(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or judgment of the court to enforce the same

shall in anywise relieve or absolve any person from any liability under the antitrust laws.

"(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

"(g) Any order issued under subsection (b) shall become final—

"(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

"(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

"(3) upon the denial of a petition for certiorari, if the order of the commission or board has been affirmed

or the petition for review has been dismissed by the court of appeals; or

"(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed.

"(h) If the Supreme Court directs that the order of the commission or board be modified or set aside, the order of the commission or board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(i) If the order of the commission or board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission or board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission or board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and

no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered upon such rehearing shall become final in the same manner as though no prior order of the commission or board had been rendered.

"(k) As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

Sec. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.

Approved July 23, 1959.

INDEX

	Page
Opinion below, jurisdiction, and statutes involved	1
Questions presented	1
Statement	2
Argument	8
Conclusion	18
Appendix	19

CITATIONS

Cases:

American Can Co. v. *Russellville Canning Co.*, 191 F. 2d 38	14
American Motors Corp. v. *Federal Trade Commission*, 384 F. 2d 247, certiorari denied, 390 U.S. 1012	13, 14
Federal Trade Commission v. *Fred Meyer, Inc.*, 390 U.S. 341	11
Federal Trade Commission v. *Henry Broch & Co.*, 363 U.S. 166	10
Federal Trade Commission v. *Jantzen*, 386 U.S. 228	15, 16
Federal Trade Commission v. *Simplicity Pattern Co.*, 360 U.S. 55	10
Flotill Products, Inc. v. *Federal Trade Commission*, 358 F. 2d 224, reversed, 389 U.S. 179	16
Fred Meyer, Inc. v. *Federal Trade Commission*, 359 F. 2d 351, certiorari denied, 386 U.S. 908	16

326-366—68

Cases—Continued

	Page
Mytinger & Casselberry v. *Federal Trade Commission*, 301 F. 2d 534	16
United States v. *Borden Co.*, 370 U.S. 460	7, 10, 12, 14

Statutes:

Clayton Act, Section 2(a), as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), *et seq*	1, 2, 9, 10, 11, 12, 15, 16
Finality Act of 1959, 73 Stat. 243	1, 14, 15, 16

Congressional:

H. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936)	11
S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936)	11

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 487

NATIONAL DAIRY PRODUCTS CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW, JURISDICTION, AND STATUTES INVOLVED

The opinions below, the basis for this Court's jurisdiction, and the statutes involved are adequately set forth in the petition (pp. 1–3) and appendix (pp. 101–110).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission properly rejected petitioner's cost-justification defense to the charge that its quantity discounts given to members of cooperative or voluntary buying groups constituted illegal price discrimination in violation of the Robinson-Patman Act, where (1) the discounts were based on the average volume per store delivered

to the entire group, (2) the cost savings that purportedly justified the discounts depend on the quantity delivered to each particular store, (3) no savings in delivery costs resulted from a store's membership in the group and (4) the volume delivered to several stores in the group would have resulted in substantially smaller discounts for them, had they not been members of the group.

2. Whether the Finality Act of 1959 applies to orders entered by the Federal Trade Commission after the effective date of that Act in a case initiated before that date.

STATEMENT

On December 31, 1957, the Federal Trade Commission issued a complaint (Pet. App. 80–90) charging that petitioner, the nation's largest distributor of dairy products, through its Sealtest Foods Division ("Sealtest"), had discriminated in price in selling milk and other dairy products, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a).[1] The hearing examiner sustained the complaint, rejecting petitioner's affirmative defenses of cost justification and good faith meeting of competition and, in July 1963, issued a cease-and-desist order (J.A. 171–172).[2]

---

[1] The complaint also charged petitioner with granting discriminatory promotional allowances in violation of Section 2(d), 15 U.S.C. 13(d). The hearing examiner sustained that charge (Pet. App. 2 n. 1), and petitioner did not challenge that ruling before either the Commission or the court of appeals (Pet. 3 n. 3).

[2] "J.A." refers to the joint appendix in the court of appeals.

On petitioner's appeal, the Commission held that petitioner had violated the statute and entered a modified cease-and-desist order (Pet. App. 23–25).[3] On review, the court of appeals rejected petitioner's contention that certain price discriminations were cost justified,[4] and affirmed and enforced the Commission's order (Pet. App. 111).

The cost justification issue asserted in the petition arises from the method Sealtest has used in pricing milk products and ice cream sold to grocery chains in the areas of Toledo, Ohio, and Memphis, Tennessee (Pet. App. 26).[5] Sealtest's practices in the Toledo area are illustrative. In 1958 it had 292 customers in Toledo, Ohio, and nearby Monroe, Michigan. Some 270 of them were single-unit independent retail stores, and the remainder belonged to chains (corporate, voluntary and cooperative) or were stores under common ownership (Pet. App. 29). Because central warehousing of fluid milk products is not feasible, petitioner's deliveries were made directly to each member of the chains as well as to each of the independents (Pet. App. 10, 40). The larger the volume taken by a given location, the smaller was petitioner's cost of delivery per case (Pet. App. 10), but whether a store was an

[3] The Commission rejected the hearing examiner's conclusion that petitioner's price discriminations might cause injury to petitioner's own competitors but sustained his finding that there was a potential of injury among competing retail sellers of Sealtest products (Pet. App. 30–31).

[4] Contrary to the Commission, the court of appeals concluded that other price discriminations were made in good faith to meet competition (Pet. App. 6–10).

[5] Petitioner made no attempt to cost justify its discounts in the third area involved in this case, New Orleans, Louisiana,

independent or one of a chain did not affect the costs of serving that store (Pet. App. 13).[6]

In 1954, petitioner's Toledo plant instituted a monthly quantity discount schedule based upon a "point system." Each fluid milk product sold by the plant was assigned a point value.[7] Monthly rebates were granted, ranging from 2 to 12 per cent, depending on the number of points accumulated during the month (Pet. App. 27).

At all times a minimum of 700 points was required to qualify for a 2 per cent discount. Under the discount schedule in effect up to 1960, 40,000 points were required to qualify for the maximum rebate (Pet. App. 28). In that year a new schedule was adopted that generally reduced the number of points required for discounts above 5 percent; a monthly volume of 10,000 points became the requirement for the 12 percent rate (Pet. App. 28–29).

At all times the rebate earned by each independent store was determined by the points that store accumulated during the month. Up to 1960, the rebate to chain customers was computed by aggregating the points of all stores in the chain.[8] Then petitioner changed to an "averaging" method. The total points of all stores in the chain were divided by the number of stores. The resulting average determined the rebate

[6] Delivery costs represented 70 percent of total distribution costs (J.A. 646).

[7] Points ranged from one for each quart of milk or buttermilk to eight for each quart of whipping cream (Pet. App. 28).

[8] Petitioner has not attempted to cost justify the aggregating practice (Pet. App. 14–15).

on the chain's total monthly purchases (Pet App. 37–39).

In July 1958, when petitioner's cost studies were conducted (Pet. App. 29, 33), 158 of petitioner's independent store customers in the Toledo area were receiving no rebate, while 112 were receiving rebates of 2 percent to 6 percent. Thirteen of the chains were receiving 12 percent, eight 10 percent, and one 7 percent (Pet. App. 3).

Petitioner sought to justify the discounts to eight of its customers in Toledo on the ground that the differing prices were justified by differing costs of sales. With exceptions not pertinent here,[9] six of the eight would have received the same 12 percent discount whether the rebate was calculated on a store-by-store basis or by petitioner's averaging method (Pet. App. 10–11). The Commission ruled that the discounts given the other two—the Saveway and Red & White stores—were not cost justified (Pet. App. 11). The two were "voluntary and cooperative groups" or "chains" (Pet. App. 29, 37 n. 3). The record shows that both the Red & White and the Saveway stores were "individually owned," that it was "the individual stores [who] are buying the milk" and that "the

[9] One store of one chain took a volume midway between the 11 and 12 percent bracket and one store of another chain had a monthly volume that would have justified only a 9 percent discount. The court of appeals (Pet. App. 8–11 n. 4) considered the former difference de minimis and the second a borderline situation as to which "any injurious effect of the discount would seem * * * remote." Commission counsel did not, in the court of appeals, contend that the use of the averaging method in these two situations was unlawful (see *id.* 15).

billing comes through the individual stores" (J.A. 926), but that petitioner sent the rebate checks to the group headquarters (J.A. 743).

Although the Commission concluded that petitioner's Toledo discount schedule was cost justified to the extent that it was applied on a location-by-location basis, because the cost studies showed that the unit costs of distributing to a store decreased with increasing volume and that the decrease at least equaled the resulting discount, it decided (Pet. App. 39–40) "that discounts to multi-unit purchasers must be cost justified on a store-by-store basis" rather than by petitioner's averaging method. Finding that (Pet. App. 40) "the averaging of purchases has no relationship to the costs actually incurred in dealing with each store," the Commission observed that the largest independent store in the area was receiving a 6 percent discount, while "a competing chain store unit of the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership in the chain", even though "mere membership" in a chain "does not lessen the cost of dealing with a store." The Commission concluded that petitioner's costing procedure did not accurately reflect the differences in the expenses of delivery to the independent stores and to the groups because, although it measured discounts to smaller chain members by savings realized in making delivery to the larger units, the method was (Pet. App. 41) "not related to the realities of the market" that "[a]n independent store competes in the sale of Sealtest milk with the individual stores of a chain" and would

therefore defeat the statutory purpose of curbing (*id.* at 40) "excessive concessions secured by chain buyers in competition with independent stores."

The Commission similarly rejected the attempted cost justification of rebates on average deliveries to the members of the two Memphis chains whose discounts were calculated by such a method (Pet. App. 52–58). But the Memphis defense was also found invalid on alternative grounds. As to one group, the Malone & Hyde stores, a voluntary buying group (Pet. App. 52–54), the Commission, relying on *United States* v. *Borden Co.*, 370 U.S. 460, ruled that the grant of the highest discount could not be based on a computation that averaged the cost of servicing Malone & Hyde stores and independents because the record demonstrated "that there were independent stores in respondent's 5 cent bracket which had volume purchases larger than the average of the Malone & Hyde stores" (Pet. App. 58). As to the other Memphis chain, Food Center, (a corporate chain with six stores, Pet. App. 56), the Commission found that the cost data failed to justify a 7-cent off-schedule discount. The record showed (*id.* 59) it cost National $.3840 per gallon to distribute ice cream to Food Center stores, whereas its cost of distribution to customers in the 5-cent bracket was $.3869, a cost difference of only $.0029 which (*ibid.*) "cannot justify a 2 cents per gallon difference in price."

The court of appeals affirmed and enforced the Commission's order (*id.* at 22). Because (*id.* 13). "[t]he cost of selling a given volume of milk to one store" is the same for chains and independents, the court concluded that "when the group or chain re-

ceives a greater discount than the independent, the seller is bowing to the size of the buyer and not making 'due allowance' for cost savings."

ARGUMENT

1. Petitioner presents the question whether "a seller's discount to a retail food chain may not be cost justified on the basis of the seller's cost of serving such a chain as a single 'purchaser,' but instead must be cost justified as if each store unit receiving deliveries were a separate purchaser" (Pet. 2; see Pet. 7); and it states (Pet. 10) that the decisions below "disregard the business reality * * * that a seller's cost of serving a chain is for all practical purposes its over-all cost of selling and delivering to the chain *as a business unit*" (emphasis in original). This broad question, however, is not presented as the case comes to this Court. The price discriminations as to which this issue of cost justification remains do not involve a "chain" in the sense of a group of stores operated as a single business entity under common control and management. Because there was no attempt to cost-justify the New Orleans discounts, and because the Commission rejected the Memphis cost defense on alternative grounds, petitioner's claim of cost justification here involves only the rebates given to cooperative or voluntary buying groups, some of whose members would have received lesser discounts through the application of petitioner's discount schedule on a location-by-location basis. These groups are the Red & White stores and the Saveway stores in Toledo, each of which was comprised of independent stores that

combined for purposes of joint purchasing and other activities, with each store retaining its fundamental characteristic as a separate business entity.[10]

(a) The Commission correctly rejected petitioner's attempt to cost justify its off-schedule discounts to these groups, on the basis of the average costs of serving the members of the group, and properly held (Pet. App. 39–40) that "discounts to [such] multi-unit purchasers must be cost justified on a store-by-store basis." Section 2(a) of the Robinson-Patman Act permits otherwise illegal price differentials "which make only due allowance for differences in the cost of * * * delivery resulting from the differing * * * quantities in which such commodities are to such purchasers * * * delivered." Petitioner delivers its products separately to each outlet in these groups; the unit cost of delivery varies with and is directly related to the volume of each delivery to each location; and it is these variations in delivery costs that petitioner relies upon to support its claim that the differentials are cost justified. But the cost of delivery is the same whether the particular location served is an independent store or a member of a cooperative buying group. The critical question is whether the lower price given to the latter outlet reflects the "differences in the cost of * * * delivery resulting from the differing * * * quantities in which" the product is delivered. In other words, the price dif-

[10] We have set forth in an appendix the facts relating to these groups and the two Memphis groups, as to which the Commission found the cost study also defective for other reasons.

ferential must be directly measured by the savings resulting from the differences in quantities delivered. Cf. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68.

Petitioner's cost calculation, based on the average cost of serving all the stores in the group, does not accurately reflect the differences in savings resulting from the different volumes delivered to the different outlets. To permit cost justification on this basis would be contrary to the basic purpose of the Robinson-Patman Act "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168). As separate entities, each member of the cooperative group presumably sets its own retail prices independently; any special discount that these stores receive would injure the competing independent stores that did not enjoy such benefits. Moreover, petitioner's averaging method could well result in a large independent receiving a lesser discount than a smaller member of the cooperative group, a result that would contravene the fundamental design of the Robinson-Patman Act. Cf. *United States* v. *Borden Co.*, 370 U.S. 460. Thus, the discounts given to the cooperative groups that pooled the purchasing power of the individual stores did not even-handedly reflect the "physical economies that are to be found in mass buying and distribution," which were the discounts that Congress intended to allow under the cost justification defense. H. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936); see S. Rep. No.

1502, 74th Cong., 2d Sess. 5 (1936). This case is therefore indistinguishable in principle from those on which the Seventh Circuit relied here (Pet. App. 12–13), where the courts of appeals uniformly have refused to approve discounts based on group buying, if, as here, the fact of group buying does not lessen the seller's cost.[11]

(b) Petitioner apparently contends (Pet. 8) that it can treat all members of the buying group as a single "purchaser" for cost justification purposes merely because the common agent of the group negotiated the terms and the conditions of the sale for all the members, and that it is immaterial "where or how the buyer takes delivery." But the record shows that each store in the group was the actual buyer, even though the rebate was paid to the group headquarters (*supra,* pp. 5–6). Moreover, only last Term this Court rejected a similarly artificial reading of the word "customer" in Section 2(d) of the Robinson-Patman Act as "wholly untenable when viewed in light of the central purpose of § 2(d) and the economic realities with which its framers were concerned". (*Fed-*

[11] Petitioner's contention (Pet. 2) that the Commission held that a valid cost justification defense may be rejected solely because its acceptance would injure competition is based on a misreading of the decisions below. Petitioner's cost justification defense was rejected because petitioner's price discriminations were found not to reflect only "due allowance" for differences in costs of delivery (see Pet. App. 13, 40–41). Indeed, in sanctioning petitioner's discount schedule to the extent that it was applied on a location-by-location basis, the Commission expressly permits petitioner to grant substantially different discounts to different customers, despite any competitive harm occasioned thereby, because such discounts were cost justified.

eral Trade Commission v. *Fred Meyer, Inc.*, 390 U.S. 341, 349). In the present case, as we have shown, the "central purpose" of the cost justification defense was to permit only those price discriminations that reflect savings in distribution costs, and the "economic realities" are that the costs of delivery said to justify the discounts vary with the quantity delivered to each location. The Commission therefore properly required petitioner to justify the discounts on the only basis that actually reflects whatever costs savings result from serving members of the group as compared to the independents: the difference in costs of delivery to the different locations. Indeed, even if the buying group itself were treated as a single purchaser, the Commission still was warranted in requiring petitioner to cost justify on a store-to-store basis, since it was the difference in the expenses of serving different members of the group that reflects the "differences in the cost of * * * delivery resulting from the differing * * * quantities in which such commodities are to such purchasers * * * delivered."

This interpretation of the statute would not, as petitioner argues (Pet. 10), preclude it from passing on to its customers any savings in actual distribution costs. Petitioner could, and may, revise its discount schedules to permit any discount—even greater than the 12 percent maximum it now has—that it can justify on the basis of its delivery costs to a particular outlet.

(c) Contrary to petitioner's contention (Pet. 13–17), the decision below is neither inconsistent with *United States* v. *Borden Co.*, *supra*, nor in conflict

with *American Motors Corp.* v. *Federal Trade Commission*, 384 F. 2d 247 (C.A. 6), certiorari denied, 390 U.S. 1012.

The question in *Borden* was whether a cost defense was invalid because it was based on a comparison of a dairy's average cost of serving all grocery chain customers with its average cost of serving all independent stores, even though there was a broad disparity in the volume of delivery and the provision of services among the separate members of each class. Although this Court held that the discounts need not be separately cost justified with respect to each customer, 370 U.S. at 468, it ruled that averaging techniques may be used to determine costs only if a seller's segregation of his customers into discount classes is based on factors having a rational bearing on the cost of servicing the customers within each class. The *Borden* study was held defective because, by comparing the average cost of servicing all chain stores with that of servicing all independents, the large independents were denied discounts available to chain stores of the same or smaller size, even though the costs of selling to those independents would be no more than in the case of the chain stores.

Here petitioner has been allowed to use averaging methods to the extent that *Borden* holds them proper, *i.e.*, the Commission accepted petitioner's use of the average cost of servicing each location taking essentially the same volume of dairy products. Nothing in *Borden*, however, sanctions petitioner's discount systems under which particular members of a cooperative or voluntary buying group could receive larger dis-

counts than independent stores which take the same delivery volume and which it costs petitioner no more to serve.

In *American Motors*, the court of appeals, reversing the Commission, sustained a cost-justification defense in which the company compared the cost of servicing four "merchandise distributors" with the average cost of servicing 6,000 other purchasers. There was no suggestion of variations in the cost of servicing the various outlets of each merchandise distributor. Rather, the question was whether American Motors properly had combined and averaged the cost of servicing the other 6,000 customers, since not all of those customers required the services that American Motors said were the justification for the higher prices charged. Petitioner, however, never sought to treat its independent customers as a single class receiving the same discount.[12]

2. The court of appeals correctly applied the Finality Act of 1959 to this case and, as that Act requires, enforced the Commission order upon affirming it.

Prior to that Act, a court of appeals could only affirm a Commission cease-and-desist order under the Clayton Act; the Commission could obtain enforcement only by showing a subsequent violation. See

[12] Petitioner also relies on *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 59 (C.A. 8). But the very quotation petitioner cites merely approved a cost defense based upon the combined cost of serving different plants "where * * * operated by a single entity"; as we have shown that is not the situation here. Moreover, in the light of this Court's subsequent decision in *Borden*, it is by no means clear that the Eighth Circuit would follow its *Russellville* decision if the issue again came before it.

Federal Trade Commission v. *Jantzen*, 386 U.S. 228, 231. "[T]o strengthen the hand of the Commission in the enforcement of the Clayton Act" (*id.* at 230), the Finalty Act provides that courts of appeals in review proceedings shall enforce such orders upon affirming them.

Section 2 of that Act provides that it shall not apply "to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11" of the Clayton Act, and that "each such proceeding" shall be governed by the former provisions of Section 11. The third and fourth paragraphs of Section 11 deal with petitions to review and to enforce Commission orders; they do not in terms apply to the administrative proceeding itself, which is the only thing in this case that was "initiated" before the Finalty Act.

In *Jantzen*, this Court held that orders entered prior to the effective date of the Finalty Act could be enforced under the old Clayton Act procedure, rejecting the view that the effect of the Finalty Act was to make such orders unenforceable. In so ruling, the Court stated (386 U.S. at 233) that in Section 2 of the Finalty Act "the word 'proceeding' was used [as meaning] the action brought by the Commission against the alleged violator of the Clayton Act." Reading this quotation literally but out of context, petitioner contends that since "the action brought by the Commission" against it was begun prior to 1959, Section 2 required the court of appeals to follow the pre-1959 review procedure, and that the court therefore should have affirmed the order, but not enforced it.

Petitioner's argument rests upon a misreading of the *Jantzen* decision. *Jantzen* had nothing to do with

the procedure for enforcing orders entered after the effective date of the Finality Act; the sole issue there involved orders entered before that date. All this Court held in *Jantzen* was that the words "proceeding initiated" covered "the filing of the 'proceeding' before the Commission *and was not limited* to the application for enforcement or petition for review" (386 U.S. at 233, emphasis added). It pointed out (*id.* p. 233–234) that in the Finalty Act Congress "wished to make clear that not only applications for enforcement of pre-Finalty Act orders and petitions for review of such orders but any action of the Commission with reference to pre-Finalty Act orders would be governed by the [old] provisions of § 11 of the Clayton Act * * *."

There is nothing in either the Finalty Act itself or the *Jantzen* decision indicating that Congress did not intend the Act to apply to all orders entered after its effective date, no matter when the administrative proceeding had begun. Indeed, it would be wholly inconsistent with the congressional purpose of strengthening Clayton Act enforcement to require the Commission to follow the old archaic procedure to obtain enforcement of an order entered seven years after the Finalty Act became law.[13]

---

[13] In several contested cases in which the issue was not raised, Commission Clayton Act orders entered after enactment of the Finalty Act have been affirmed and enforced even though the administrative proceedings were begun before the Finalty Act became law. See, *e.g.*, *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351 (C.A. 9), certiorari denied, 386 U.S. 908; *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (C.A. 9), reversed on another issue, 389 U.S. 179; *Mytinger & Casselberry* v. *Federal Trade Commission*, 301 F. 2d 534 (C.A.D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN M. ZIMMERMAN,
Assistant Attorney General.

GREGORY B. HOVENDON,
ARTHUR I. CANTOR,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

ALVIN L. BERMAN,
Attorney,
Federal Trade Commission.

NOVEMBER 1968.

APPENDIX

Facts Relating to the Four Multiple-Outlet Purchasers as to Which the Court of Appeals Upheld the Commission's Rejection of Petitioner's Cost Justification Defense Because Based Upon the Average Cost of Serving All the Outlets in the Group, Rather Than the Individual Cost of Serving Each Outlet

The Commission found (Pet. App. 35, 57–58) that petitioner had cost justified its regular discount schedules in both Toledo and Memphis, and the only remaining issue concerns the attempted justification of petitioner's application of its quantity-discount schedules to the average deliveries to members of the four groups.

1. *Toledo.* In Toledo, as the court of appeals pointed out (Pet. App. 10), petitioner relied on the cost justification defense "with respect to 8 of its 22 customers receiving discriminatory discounts." The court held (*id.*, 10–11) that the averaging "would be permissible for National with respect to six of its corporate chain customers," because the discounts they received under the average calculation were no greater than they would have received were the cost of serving each store determined individually (see, also, *id.*, p. 15). The court then stated (*id.*, p. 11): "However, in the case of the Red & White Stores and the Saveway Stores, the averaging method would not be justified in granting a 12% discount to each member store because various of them individually purchased enough milk only to qualify for a much smaller per-

centage discount, such as received by most of National's independent store customers."

Petitioner's own exhibit listed Red & White and Saveway as "Voluntary and Cooperative Groups" (as distinguished from another group described as "Corporate Chains") (Respondent's Ex. 127A, Respondent's Exhs. in the court of appeals, Volume II, p. 392); the Commission found that both Red & White and Saveway were "voluntary and cooperative groups [or] chains" (Pet. App., pp. 29, 37, n. 3); petitioner's brief in the court of appeals similarly described them as "voluntary groups" (again as distinguished from "corporate chains") (Petitioner's brief, p. 10); and the court of appeals so viewed them (Pet. App. 11). Petitioner now states (Pet., p. 5, n. 5), however, that Saveway "own[ed] stores." Although originally Saveway was a corporate chain of 14 stores owned by a single individual, since 1946 it had been joined by several individual stores in a group-buying operation (J.A. 916–917). The Commission found (Pet. App. 51 n. 9) that the Saveway "corporate chain [was] disbanded in 1958 and the stores became members of the Red & White voluntary group." The former owner of the Saveway corporate chain testified at the hearings in 1960 (J.A. 926) that "[t]he Saveway stores are individually owned, too, the same as the Red & White"; he also testified (*ibid.*) that in the Red & White group it was "the individual stores [who] are buying the milk," and that "the billing comes through the individual stores."

2. *Memphis.* Petitioner sought to justify its off-schedule discounts only with respect to two customers in Memphis (Pet. App. 58): The Malone & Hyde stores, a cooperative buying and warehousing organization (*id.* 52–54); and Food Center, "a corporate chain with six stores" (*id.*, 56). In the case of Malone

& Hyde the Commission, rejecting the contention that this firm was a wholesaler who purchased for all members of the group (Pet. App. 53), found that petitioner's sales "were made to the member stores of the Malone & Hyde organization and that these stores performed no function different from that performed by their competitors who purchased respondent's ice cream" (Pet. App. 55)—a finding the court of appeals sustained (Pet. App. 17–18).

Although the Commission held impermissible, for the reasons given in its discussion of the Toledo cost justification defense (see the Statement, supra, p. 6), petitioner's use of averaging costs in serving these two groups of stores (*id.*, 58), it further ruled (*ibid.*) that "the cost justification defense is invalid as to both of these groups for other reasons," which it detailed, see p. 7, *supra*.

In discussing the Memphis discriminations, petitioner's main brief in the court of appeals focused almost entirely upon the Malone & Hyde stores, and made only passing references to Food Center (pp. 14–15, 85–87); its reply brief similarly shows that the major cost justification issue in Memphis related to Malone & Hyde (reply brief, pp. 29–32). The court of appeals' detailed discussion of the Memphis cost justification dealt solely with the Malone & Hyde stores (Pet. App. 17–18).

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT, U. S.

FILED

DEC 2 1968

JOHN F. DAVIS, CLERK

No. 487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION

REPLY BRIEF FOR NATIONAL DAIRY PRODUCTS CORPORATION ON PETITION FOR A WRIT OF CERTIORARI

JOHN T. CHADWELL
RICHARD W. MCLAREN
PAUL H. LARUE
135 South LaSalle Street
Chicago, Illinois 60603

Of Counsel:

CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle St.
Chicago, Ill. 60603

WILLIAM E. NUESSLE
JOHN M. RICHMAN
260 Madison Avenue
New York, New York 10016

Attorneys for Petitioner

December 2, 1968

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

No. 487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION

REPLY BRIEF FOR NATIONAL DAIRY PRODUCTS CORPORATION ON PETITION FOR A WRIT OF CERTIORARI

As grounds for issuance of a writ of certiorari, petitioner urged that, by rejecting "per purchaser" cost justification of discounts to food chains in favor of a "store-by-store" costing requirement, the Federal Trade Commission and the Court of Appeals for the Seventh Circuit established an artificial and non-objective standard; that, in so doing, they disregarded the plain meaning of the cost justification proviso of Section 2(a) of the Robinson-Patman Act, ignored the principle that cost justification is an absolute defense to a charge of price discrimination, and departed from well established and commonly accepted interpretations of the proviso. In addition, petitioner urged that the Court of Appeals erred in applying the Finality Act of 1959 to a proceeding initiated by the Commission in 1957. The Brief for the Federal Trade Commission in Opposition[1] either fails entirely to meet petitioner's arguments,

---

1. Hereinafter cited "G.B. . . ."

or answers them in oblique or inadequate fashion. The main thrust of the Brief in Opposition is that the holdings which petitioner claims are erroneous are not ripe for review by this Court. Accordingly, petitioner will not further argue the substantive matters which are raised in its petition and left substantially unanswered by the Brief in Opposition, but will direct this reply brief to the ripeness question.

One of the primary matters litigated in this case was whether or not petitioner may cost justify its discounts to corporate chain customers on a "per purchaser" basis.[2] In its decision, the Federal Trade Commission categorically held that discounts to such multi-unit chains "must be cost justified on a store-by-store basis,"[3] and the Court of Appeals for the Seventh Circuit, upholding the Commission's order, observed that there is no difference from the cost standpoint "whether . . . [a] store is part of a group or chain or an independent."[4] Although recognizing these facts, the Brief in Opposition urges that the only remaining cost question presented is whether or not discounts to "cooperative or voluntary buying groups" must be cost justified on a store-by-store basis (G.B. 1-2, 7-8).

In substance, therefore, it is the government's position that the question presented by petitioner—*i.e.*, whether for cost justification purposes it is "the seller's cost of serv-

---

2. The complaint challenged petitioner's allowance of discounts to chains and buying groups "without regard to the monthly volume of purchases of . . . individual stores . . ." (See Appendix to Petition for a Writ of Certiorari [hereinafter cited "Pet. . . ."], p. A-86).

3. See Pet. A-40; see also *id.* at A-38 — A-39, A-41 — A-42.

4. Pet. A-13. The Court of Appeals indicated that, even though petitioner's intra-state competitors might "continue to grant averaged discounts to chains" while petitioner could not, petitioner could meet their prices under "the meeting competition defense" (Pet. A-13 — A-14).

ing . . . a chain as a single 'purchaser' "[5] that is to be taken into account—is not ripe for decision. The government is clearly wrong in this regard. The question which petitioner has presented is not only ripe for decision in this case under well established administrative law standards, but it is of the utmost importance to the business community as well as to those responsible for administering the Robinson-Patman Act that this question be settled now.

1. The present case meets the two tests of the "ripeness doctrine" in that the "per purchaser" versus "store-by-store" cost determination issue is now appropriate for judicial determination, and a denial thereof would cause severe hardship to the petitioner. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 170 (1967). In *Abbott Laboratories*, this Court pointed out (387 U.S. at 148-49) that the basic rationale of the "ripeness doctrine" is to prevent the courts,

> "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

The Commission's position requiring store-by-store cost justification by corporate chains has been "formalized" not only in its July 1966 decision in the instant case but in an advisory opinion issued and published in October 1967.[6]

---

5. See Pet. 2.

6. Advisory Opinion Digest No. 145, TRADE REG. REP. ¶ 18,083 (1967). Explaining its ruling that cost justification by a centrally-owned chain of three retail grocery stores must be "on a store-by-store basis," the Commission noted that "[s]ince independent and singly owned retail stores are served in identically the same manner, it [per-purchaser costing] would confer an advantage on the

Clearly, therefore, what is now before the Court is no "abstract disagreement."

Moreover, here, as in *Abbott Laboratories,* the question to be decided is fundamentally a legal one, *i.e.,* a matter of statutory construction, including the meaning of the terms "purchaser" and "cost" as used in the cost justification proviso of Section 2(a), and whether or not the defense of cost justification is an absolute defense to a charge of 2(a) violation (see Pet. 8-13). Certainly, these are questions ultimately to be decided by this Court, and they are ripe for decision on this record.

It is equally clear that denial of review in this case would place petitioner in a serious dilemma, and no matter what course it elected to follow, it would be subjected to severe hardship.

If this Court should deny certiorari, there can be no question whatsoever that in all areas of the United States in which petitioner sells milk and ice cream, the Commission would attempt, as a part of its compliance procedure, to require that petitioner's chain discounts be cost justified "on a store-by-store basis."

Were petitioner to comply with this ruling, its pricing flexibility would be curtailed. It would be placed at a competitive disadvantage not only with intra-state com-

---

multi-unit store, not by virtue of any savings in cost to the store but solely by reason of its membership in the centrally owned organization" (*ibid.*). Just as in the instant case, that opinion in effect substitutes "delivery point" for "purchaser" in the cost proviso, and it ignores the fact that a seller has an absolute defense to a charge of price discrimination if his discounts "make only due allowance for differences in the cost of . . . sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" (Pet. 3).

petitors not subject to the Robinson-Patman Act, but with the Borden Company, one of its principal competitors, which is operating under a United States District Court decree that permits "per purchaser" costing,[7] and with other inter-state competitors who interpret the decisions in the instant case (consistent with the government's contentions) as leaving the issue unsettled.

Of course, petitioner could initiate a new proceeding, contesting in the courts the Federal Trade Commission's demand that it comply with the order herein by adopting "store-by-store" costing for chains.[8] Or it could refuse to comply and take its chances in a penalty proceeding brought by the Commission. But there is no certainty that petitioner could get a determination on the merits of the question it now presents, for the Commission certainly would urge, under the rule of *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952), that petitioner has had its day in court on this question — that it

> "cannot again interpose the same defense upon substantially similar facts when the Commission seeks to show that its order has been violated. The same result follows where the evidence supporting the defense, although not produced in the previous proceedings, was then available to the seller . . . [T]he seller . . . may plead only those facts constituting statutory justification which it has not had a previous opportunity to present." (*Id.* at 476-77)

---

7. See Pet. 14. The Brief in Opposition thus is completely in error in suggesting that "petitioner has been allowed to use averaging methods to the extent that *Borden* holds them proper . . ." (G.B. 13).

8. See Abbott Laboratories v. Gardner, 387 U.S. 136, 149-51 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); FTC v. Nash-Finch Co., 288 F.2d 407 (D.C. Cir. 1961); Elmo Division v. FTC, 348 F.2d 342 (D.C. Cir. 1965).

In summary, the situation here is very like that which the Court described in *Abbott Laboratories* (387 U.S. at 153):

> "It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non-compliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here."

The instant proceeding was begun more than ten years ago. The record shows that, in its efforts to achieve definitive standards in compliance with the cost justification proviso, petitioner spent over $450,000 on detailed, far-ranging cost studies. It should not now be turned away to seek a definitive ruling on the "per purchaser" versus "store-by-store" issue in a further expensive, and doubtless protracted, cycle of litigation.

2. The public interest will best be served by a determination now of the question which petitioner has presented. Generally accepted statistics on food store sales indicate that corporate chains account for some 42% of the value of all such sales on a national basis,[9] Many products aside from milk and ice cream are store-door delivered. Pur-

---

9. See PROGRESSIVE GROCER, 35TH ANNUAL REPORT OF THE GROCERY INDUSTRY 236 (April 1968).

veyors of such other products, as well as milk and ice cream companies, the corporate chains themselves, and the lower courts as well as administrative authorities responsible for determining Robinson-Patman Act cost-justification questions, require clarification of the serious and sensitive question here presented with respect to pricing to corporate chains.

But there is also a real public interest in a decision by this Court as to whether wholesaler sponsors and cooperative headquarters which buy for their voluntary and cooperative member stores are entitled to be treated as "purchasers" for cost justification purposes—as Congress appears to have intended (see Pet. 9 n. 12).[10] It will not do for the government simply to argue that a store which is a group member may wind up with a larger discount than a competing independent store of like size and that this is "contrary to the basic purpose of the Robinson-Patman Act" (G.B. 10). "Per purchaser" costing and pricing, by definition, involves payment of discounts not in excess of a seller's cost savings in serving a particular purchaser.[11] Thus, if a small storekeeper-member ultimately receives from his group headquarters a discount larger than he individually "earned," a bigger fellow member quite clearly must receive a discount smaller than he individually

---

10. The National Commission on Food Marketing credits the voluntary and cooperative group movement for the survival of independent wholesale and retail food merchants. ORGANIZATION AND COMPETITION IN FOOD RETAILING 37-38 (Tech. Study No. 7, June 1966).

11. The Commission recognized in its decision in the instant case that petitioner's "averaging" system does not result in discounts exceeding "per purchaser" cost savings. See Pet. A-40. ("... respondent takes the *over cost justification* in delivery to the large stores of a chain and credits this time saved to the smaller stores").

"earned." Section 2(a) is concerned with preventing a seller from paying a purchaser a non-cost justified discount; it is not concerned, we submit, with how a purchaser may divide up or use a cost justified discount once it is received.[12] Certainly, the important question of how voluntary and co-operative food chains shall be treated for cost justification purposes, as well as the vital question presented on this petition with respect to corporate chain purchasers, should not now be left in the limbo to which the government's brief would consign them.

---

12. This case is quite unlike the so-called *Auto-Parts* cases, some of which were cited by the Court of Appeals (see Pet. A-13), where the cooperative and voluntary groups were "bookkeeping devices" for the collection of rebates from suppliers, and where there was no claim of cost justification. See, *e.g.*, American Motor Specialties Co. v. FTC, 278 F. 2d 225, 227 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

CONCLUSION

For all the reasons hereinabove set forth and in the earlier petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN T. CHADWELL

RICHARD W. MCLAREN

PAUL H. LARUE

135 South LaSalle St.
Chicago, Ill. 60603

Of Counsel:
CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle Street
Chicago, Illinois 60603

WILLIAM E. NUESSLE

JOHN M. RICHMAN

260 Madison Avenue
New York, N.Y. 10016

Attorneys for Petitioner

December 2, 1968